



[4910-06-P]

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 271

[Docket No. FRA-2009-0038, Notice No. 7]

RIN 2130-AC11

Risk Reduction Program

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: FRA is issuing this final rule to require each Class I freight railroad and each freight railroad with inadequate safety performance to develop and implement a Risk Reduction Program (RRP) to improve the safety of its operations. RRP is a comprehensive, system-oriented approach to safety that determines a railroad operation's level of risk by identifying and analyzing applicable hazards, and involves developing plans to mitigate, if not eliminate, that risk. Each railroad has flexibility to tailor an RRP to its specific railroad operations. Each railroad shall implement its RRP under a written RRP plan that FRA has reviewed and approved. Each railroad shall conduct an annual internal assessment of its RRP, and FRA will audit a railroad's RRP processes and procedures.

DATES: This final rule is effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

ADDRESSES: *Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> at any time or visit U.S.

Department of Transportation, Docket Operations, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Miriam Kloeppel, Staff Director, Risk Reduction Program Division, U.S. Department of Transportation, Federal Railroad Administration, Office of Railroad Safety, 1200 New Jersey Avenue, SE, Washington, DC 20590 (telephone: 202-493-6224), *Miriam.Kloeppel@dot.gov*; or Elizabeth Gross, Attorney Adviser, U.S. Department of Transportation, Federal Railroad Administration, Office of Chief Counsel, 1200 New Jersey Avenue, SE, Washington, DC 20590 (telephone: 202-493-1342), *Elizabeth.Gross@dot.gov*.

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I. Executive Summary

A. Statutory Authority for this Rulemaking

FRA's general authority to issue rules on railroad safety is 49 U.S.C. 20103(a), which establishes the authority of the Secretary of Transportation (Secretary) to promulgate regulations for every area of railroad safety. The Secretary has delegated such statutory responsibilities to the Administrator of FRA. *See* 49 CFR 1.89. FRA is issuing this rule to satisfy the statutory mandate in sections 103 and 109 of the Rail Safety Improvement Act of 2008 (RSIA), Pub. L. 110-432, Division A, 122 Stat. 4848 *et seq.*, codified at 49 U.S.C. 20156 and 20118-20119. The Secretary delegated responsibility to carry out her responsibilities under RSIA sections 103 and 109, and the general responsibility to conduct rail safety rulemakings under 49 U.S.C. 20103(a), to the Administrator of FRA. *See* 49 CFR 1.89(a) and (b).

B. Summary of Major Provisions

FRA is issuing this RRP rule as part of its efforts to continually improve rail safety and to satisfy the statutory mandate in RSIA sections 103 and 109 requiring each Class I freight railroad and each freight railroad with inadequate safety performance to develop and implement an RRP.¹ A railroad not otherwise required to comply with the rule may also voluntarily submit an RRP plan for FRA review and approval. On August 12, 2016, 81 FR 53850, FRA published a separate system safety program (SSP) rule implementing this mandate for commuter and intercity passenger railroads.

¹ FRA understands that each railroad subject to this RRP rule has a unique operating system, and not all railroads have the same amount of resources. Best practices for implementing an RRP will therefore differ from railroad to railroad. Accordingly, this rule does not establish prescriptive requirements that may be appropriate for one railroad but unworkable for another. Instead, the rule establishes general, performance-based requirements. This approach provides each railroad flexibility to tailor those requirements to its specific operations.

An RRP is implemented by a written risk reduction program plan (RRP plan). The RRP rule sets forth various elements that a railroad's RRP plan must contain to properly implement an RRP. As part of its RRP plan, a railroad must also describe the various procedures and processes for implementing this rule's requirements. This includes procedures and processes for, but not limited to, the following RRP components: risk-based hazard management program; safety performance evaluation; safety outreach; technology implementation plan; RRP employee/contractor training; railroad employee involvement; and internal assessment.

The main components of an RRP are the risk-based hazard management program and risk-based hazard analysis. A properly implemented risk-based hazard management program and risk-based hazard analysis will identify the hazards and resulting risks on the railroad's system, develop methods to mitigate or eliminate (if practicable) these hazards and risks, and set forth a plan to implement these methods. As part of its RRP, a railroad will also consider various technologies that may mitigate or eliminate the identified hazards and risks.

An RRP will affect almost all facets of a railroad's operations. To ensure all railroad employees an RRP directly affects have an opportunity to provide input on the development, implementation, and evaluation of a railroad's RRP, the rule requires railroads to consult in good faith, and use their best efforts to reach agreement with, such employees on the RRP plan contents and any substantive amendments to the plan. Appendix A to the rule contains guidance on what constitutes good faith and best efforts.

An RRP can be successful only if a railroad engages in a systematic assessment of the hazards and resulting risks on its system. However, a railroad may be reluctant to

reveal such hazards and risks if there is the possibility that such information may be used against it in a court proceeding for damages. Congress directed FRA to conduct a study to determine if it was in the public interest to withhold certain information, including the railroad's assessment of its safety risks and its statement of mitigation measures, from discovery and admission into evidence in proceedings for damages involving personal injury and wrongful death. *See* 49 U.S.C. 20119. Further, Congress authorized FRA, by delegation from the Secretary, to prescribe a rule, subject to notice and comment, to address the results of the study. *See* 49 U.S.C. 20119(b). FRA contracted to have the study performed, and the RRP notice of proposed rulemaking (NPRM) addressed the study's results and set forth proposed protections for certain information from discovery, admission into evidence, or use for other purposes in a proceeding for damages. *See* 80 FR 10963-10966 (Feb. 27, 2015).

To minimize the information protected, information a railroad compiles or collects solely to plan, implement, or evaluate an RRP is protected from discovery, admissibility into evidence, or use for other purposes in a proceeding for damages involving personal injury, wrongful death, or property damage. The rule also preempts State discovery rules and sunshine laws which could be used to require the disclosure of protected information in such proceedings. This rule does not protect information a railroad compiles or collects for a purpose unrelated to the railroad's RRP. Under section 20119(b), the information protection provision is not effective until one year after its publication. All other provisions of this final rule will become effective 60 days after the date of publication.

Section 20118 also specifies that certain risk reduction records the Secretary obtains are exempt from the Freedom of Information Act (FOIA) public disclosure requirements. This exemption is subject to two exceptions for disclosure (1) necessary to enforce or carry out any Federal law and (2) when a record is comprised of facts otherwise available to the public and FRA determines disclosure would be consistent with the confidentiality needed for RRP. *See* 49 U.S.C. 20118. Unless an RSIA exception applies, FRA would not disclose such records in response to a FOIA request. *See* 5 U.S.C. 552(b)(3) and 49 CFR 7.23(c)(3). Therefore, FRA concludes railroad risk reduction records in FRA's possession would be exempted from mandatory disclosure under FOIA unless one of the two exceptions applies.

The rule requires a Class I railroad to submit its RRP plan to FRA for review no later than [INSERT DATE 545 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**]. This submission deadline accounts for the statutory one-year delay before the information protection provision becomes effective. Similarly, the rule does not require railroads with inadequate safety performance (ISP railroads) or railroads the Surface Transportation Board (STB) either reclassifies or newly classifies as Class I railroads after the effective date of the final rule to submit RRP plans before the information protection provisions go into effect. An ISP railroad must submit an RRP plan either 180 days after receiving notice FRA determined the ISP railroad had inadequate safety performance or no later than [INSERT DATE 545 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], whichever is later. A railroad the STB reclassifies or newly classifies as a Class I railroad must submit its RRP either no later than 90 days following the effective date of the classification or

reclassification or no later than [INSERT DATE 545 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], whichever is later.

Within 90 days of receipt of a railroad's RRP plan, FRA will review the plan and determine if it meets the requirements of the rule. If FRA determines the railroad's RRP plan does not comply with the rule, FRA will notify the railroad of how the plan is deficient. The railroad will then have 90 days to correct the deficiencies and resubmit the plan to FRA. Whenever a railroad amends its RRP plan, it must submit the amended plan to FRA for approval and provide a cover letter describing the amendments. (FRA approval is not required for amendments limited to adding or changing a name, title, address, or telephone number of a person, although a railroad must still file the amendment with FRA.) A similar approval process and timeline will apply whenever a railroad substantively amends its RRP.

C. Summary of Costs and Benefits

The rule requires each Class I freight railroad and each ISP railroad to develop and implement an RRP in accordance with a written RRP plan approved by FRA. The rule sets forth required elements that must be included in a railroad's RRP. FRA estimates that the rule's costs for these elements include: developing a risk-based hazard management program (HMP); documenting an RRP plan and any RRP plan amendments; consulting with directly affected employees and preparing consultation statements; conducting a safety performance evaluation; conducting safety outreach; conducting a technology analysis and developing a technology implementation plan; ensuring employee involvement; providing RRP training; retaining RRP records; and conducting internal assessments. FRA did not estimate the full incremental costs of railroads

conducting additional and systematic hazard and risk analyses or implementing actions to mitigate identified hazards and risks. FRA lacks information to reliably estimate such costs because FRA cannot predict the level of hazards and risks on impacted railroads nor the means these railroads will use to mitigate these risks.

Costs begin in the first year of analysis. The below tables summarize the rule's total costs over a ten-year period based on Class I railroads having a 43-percent pre-compliance rate and ISP railroads having no pre-compliance, with a total cost of \$40.2 million, using a 7-percent discount rate (present value (PV), 7-percent) (Table 1) and \$51.0 million, using a 3-percent discount rate (PV, 3-percent) (Table 2). The annualized costs are \$5.7 million (PV, 7-percent) and \$5.9 million (PV, 3-percent).

Table 1: Summary of the Rule's Total Costs (ten-year period), Assuming 43-percent Class I Pre-rule Compliance; PV, 7-percent

Costs	Class I Railroads	ISP Railroads	All Railroads
Subpart A: General	\$ -	\$ 7,000	\$ 7,000
Subpart B: RR Programs	\$ 35,725,000	\$ 2,216,000	\$ 37,941,000
Subpart C: RRP Plans	\$ 656,000	\$ 1,053,000	\$ 1,709,000
Subpart D: Review and Approval of Plans	\$ 2,000	\$ 7,000	\$ 9,000
Subpart E: Internal Assessments	\$ 171,000	\$ 312,000	\$ 483,000
Subpart F: External Audits	\$ 28,000	\$ 32,000	\$ 60,000
Total Cost, 7% present value	\$ 36,582,000	\$ 3,627,000	\$ 40,209,000
Annualized, 7%	\$ 5,210,000	\$ 516,000	\$ 5,726,000

Table 2: Summary of the Rule's Total Costs (ten-year period), Assuming 43-percent Class I Pre-rule Compliance; PV, 3-percent

Costs	Class I Railroads	ISP Railroads	All Railroads
Subpart A: General	\$ -	\$ 9,000	\$ 9,000
Subpart B: RR Programs	\$ 45,156,000	\$ 3,011,000	\$ 48,167,000
Subpart C: RRP Plans	\$ 771,000	\$ 1,329,000	\$ 2,100,000
Subpart D: Review and Approval of Plans	\$ 2,000	\$ 8,000	\$ 10,000
Subpart E: Internal Assessments	\$ 230,000	\$ 413,000	\$ 643,000
Subpart F: External Audits	\$ 37,000	\$ 43,000	\$ 80,000
Total Cost, 3% present value	\$ 46,197,000	\$ 4,813,000	\$ 51,000,000

Annualized, 3%	\$ 5,416,000	\$ 564,000	\$ 5,979,000
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Benefits that come from the final rule will vary from railroad to railroad. These benefits are based on each railroad's organizational structure, the ability for labor and management to collaborate, and the steps the railroad takes to implement hazard analysis and mitigation. FRA could not reliably predict the specific risks that each freight railroad will identify, the actions each freight railroad will take to mitigate such risks, or the success rate of such actions. Therefore, this analysis qualitatively describes benefits. Details on the estimated benefits of this final rule can be found in the rule's Regulatory Impact Analysis (RIA), which FRA has prepared and placed in the docket (docket no. FRA-2009-0038).²

FRA expects that the final rule will increase the effectiveness of railroad hazard mitigation strategies, which will reduce the frequency of accidents and incidents on the general railroad system. FRA also expects that the final rule will result in increased employee morale and improved working conditions, which will improve railroad productivity. These benefits will result because the final rule:

- 1) Ensures that railroads keep their RRP's current and in place;
- 2) Improves safety culture;
- 3) Requires ongoing employee involvement and proactive collaboration between labor and management; and
- 4) Provides information protection which allows for a systematic risk-based hazard analysis.

² Document inspection and copying facilities are available at Room W12-140 on the ground level of the West Building, 1200 New Jersey Avenue, SE, Washington, DC 20590. The docket for this rulemaking is also available online at www.regulations.gov under docket no. FRA-2009-0038.

The final rule requires each Class I railroad to have a fully implemented RRP within five years of the rule's effective date and requires the first set of ISP railroads to implement all portions of their RRP within six years after the final rule's effective date.³ FRA anticipates that railroads may implement some components of their RRP plan before the required implementation dates specified in the final rule. Therefore, this analysis estimates that the final rule will start generating benefits in the fourth year (year 2022), when Class I railroads will have substantially implemented their RRP. As previously discussed, Class I railroads have in place existing activities related to the final rule's required components. The existing levels of pre-rule compliance reduce the size of potential benefits that follow from issuing the final rule.

II. Abbreviations

The following abbreviations are used in this preamble and are collected here for the convenience of the reader:

CFR	Code of Federal Regulations
DOT	United States Department of Transportation
FMP	Fatigue Management Plan
FOIA	Freedom of Information Act
FR	<i>Federal Register</i>
FRA	Federal Railroad Administration
HMP	Hazard Management Program
NPRM	Notice of Proposed Rulemaking

³ An ISP railroad should begin to realize benefits approximately three years after FRA approves its RRP plan, the point when the final rule requires the ISP railroad to have fully implemented its RRP. The final rule requires each ISP railroad that is part of the first group of ISP railroads to implement in full an RRP by the sixth year.

OST	Office of the Secretary, United States Department of Transportation
PTC	Positive Train Control
Pub. L.	Public Law
RRP	Risk Reduction Program
RSAC	Railroad Safety Advisory Committee
RSIA	Railroad Safety Improvement Act of 2008, Pub. L. 110-432, Div. A, 122 Stat. 4848
Secretary	Secretary of Transportation
SSP	System Safety Program
U.S.C.	United States Code

III. Background and History

A. What is a Risk Reduction Program?

Risk reduction is a comprehensive, system-oriented approach to improving safety by which an organization formally identifies and analyzes applicable hazards and takes action to mitigate, if not eliminate, the risks associated with those hazards. It provides a railroad with a set of decision making processes and procedures that can help it plan, organize, direct, and control its railroad operations in a way that enhances safety and promotes compliance with regulatory standards. As such, risk reduction is a form of safety management system, which is a term generally referring to a comprehensive, process-oriented approach to managing safety throughout an organization.

The principles and processes of risk reduction are based on safety management systems (SMS) developed to assure high safety performance in various industries, including aviation, passenger railroads, the nuclear industry, and other industries with the

potential for catastrophic accidents. SMS methodologies have evolved through experience to include a multitude of equally important elements without which the organization's safety performance does not reliably improve. These SMS elements are typically grouped into the following larger descriptive categories: (1) an organization-wide safety policy; (2) formal methods for identifying hazards and prioritizing and mitigating risks associated with those hazards; (3) data collection, data analysis, and evaluation processes to determine the effectiveness of mitigation strategies and to identify emerging hazards; and (4) outreach, education, and promotion of an improved safety culture within the organization.

B. Summary of NPRM

On February 27, 2015, FRA published the NPRM proposing to require each Class I freight railroad and each freight railroad with inadequate safety performance to develop and implement an RRP to improve the safety of their railroads operations. *See* 80 FR 10950. The NPRM proposed the following RRP components: (1) a risk-based hazard management program; (2) safety performance evaluation; (3) safety outreach; (4) technology analysis and technology implementation plan; (5) implementation and support training; (6) internal assessments; and (7) external audits. The NPRM also proposed requiring a railroad to submit its RRP plan to FRA for review and approval and to consult in good faith and use its best efforts to reach agreement with all its directly affected employees on the contents of the RRP plan. Finally, the NPRM proposed to protect certain RRP information from discovery, admission into evidence, or use for other purposes in a proceeding for damages.

In addition to these specific proposals, the NPRM contained a general background discussion of risk reduction programs and discussed FRA's experience with risk reduction programs, such as passenger railroads that have implemented system safety programs. The NPRM also summarized the rulemaking proceedings that occurred before NPRM publication, including publication of an advanced notice of proposed rulemaking (ANPRM) and related proceedings of the RSAC RRP Working Group. FRA is providing relevant updates to these discussions below.

C. Proceedings Since the NPRM

The comment period for the NPRM closed on April 28, 2015. As several commenters requested, FRA held a public meeting on August 27, 2015 and invited interested parties to present oral statements and to offer information and views on the proposed rulemaking at the hearing. FRA placed the transcript for the public hearing in the docket for this rulemaking. FRA also reopened the public comment period from July 30, 2015 through September 10, 2015 and from September 15, 2015 through September 18, 2015 to accommodate the public hearing and to allow interested parties to submit comments in response to views and information provided at the public hearing.

On September 29, 2015, the RSAC RRP Working Group met to review and discuss comments received in response to both the NPRM and the public hearing. FRA then reopened the comment period for this rulemaking from October 7, 2015 through October 21, 2015 to allow interested parties to submit written comments in response to views or information provided at the RRP Working Group meeting.

D. Regulatory Review

DOT has invited the public to provide input on existing rules and other agency actions that are good candidates for repeal, replacement, suspension, or modification. *See* 82 FR 45750 (Oct. 2, 2017). As appropriate, this final rule responds to comments submitted in response to DOT's regulatory review initiative that address railroad safety risk reduction programs under the RSIA.

E. Summary of Comments

FRA received 80 comments in response to the NPRM, the public hearing, and the RRP Working Group Meeting. Some interested parties submitted multiple comments. FRA received comments from a variety of entities, including railroads, trade associations, non-profit employee labor organizations, State elected representatives, non-profit advocacy organizations, and private citizens.⁴ Various interested labor organizations (Labor Organizations I) jointly filed a comment in response to the NPRM,⁵ and a different group of labor organizations (Labor Organizations II) also filed a comment in response to information presented at the RRP Working Group meeting.⁶ Finally, some

⁴ Commenters included: Academy of Railroad Labor Attorneys; American Association of Justice; American Public Transportation Association; American Short Line and Regional Railroad Association; Association of American Railroads; Association of Tourist Railroads and Railway Museums; Bureau of Locomotive Engineers and Trainmen (BLET); California State Senator (3rd District) Lois Wolk; Chesapeake Climate Action Network; City of Portland, Oregon; DNV GL Oil & Gas Risk Advisory Services; Friends of the Earth; International Association of Sheet Metal, Air, Rail and Transportation Workers – Transportation Division (SMART Transportation Division); Mountain Watershed Association; National Safety Council; New Jersey Work Environment Council; North Platte Peer Review Team; Orion's Angels; Public Citizen Texas; Rancho Rail Line; State of Washington Representative (46th Legislative District) Jessyn Farrell; Toxics Use Reduction Institute; Transport Action Canada; Union Pacific Railroad; and 45 individuals.

⁵ These included: American Train Dispatchers Association (ATDA); BLET; Brotherhood of Maintenance of Way Employees Division (BMWED); Brotherhood of Railroad Signalmen (BRS); Brotherhood Railway Carmen Division TCU/IAM; SMART Transportation Division; and Transport Workers Union of America (TWU).

⁶ These included: BLET; BMWED; BRS; SMART Transportation Division; and Transportation Communication Union (TCU).

organizations also filed a joint comment (Group Letter).⁷ Additionally, in response to DOT's regulatory review initiative, American Short Line and Regional Railroad Association (ASLRRA) and the Virginia Railway Express (VRE) each submitted a comment discussing railroad safety risk reduction programs under the RSIA.

Generally, all commenters were in favor of RRP. While the comments contained varying suggestions on the structure and breadth of an RRP, most commenters agreed a properly implemented RRP would increase the safety of railroad operations. Many commenters, however, expressed concern about the FRA proposal to limit the use of some RRP information in legal proceedings for damages. FRA discusses this and other specific comments in further detail below.

E. Update on Other Federal Safety Management System Programs

The RRP NPRM discussed other Federal agencies that had established or proposed safety management system requirements or guidance for regulated entities. Specifically, the NPRM discussed Federal Transit Administration regulations, regulations the Federal Aviation Administration (FAA) proposed, and guidelines the U.S. Department of Defense published. *See* 80 FR 10953 (Feb. 27, 2015). For a discussion of post-NPRM developments with these programs and new Federal safety management system initiatives please see the SSP final rule at 81 FR 53853-53854 (Aug. 12, 2016).

IV. Statutory Background

⁷ Group Letter organizations were: Alliance for Justice; Bay Area Refinery Corridor Coalition; Blue Ridge Environmental Defense League; Center for Effective Government; Center for Justice and Democracy; Citizens Acting for Rail Safety; Citizens for a Clean Harbor; Crockett-Rodeo United to Defend the Environment; Benicians for a Safe and Healthy Community; Delaware Riverkeeper Network; Forest Ethics; Friends of Grays Harbor; Friends of the Earth; Idaho Conservation League; Milwaukee Riverkeeper; Protect All Children's Environment; Public Citizen; United Steelworkers; US PIRG; Sciencecorps; Sierra Club; The SunFlower Alliance; Yolo MoveOn; and Youghiogheny Riverkeeper, Mountain Watershed Association.

A. Rail Safety Improvement Act of 2008

RSIA section 103(a) directs the Secretary to issue a regulation requiring Class I railroads, railroad carriers that provide intercity rail passenger or commuter rail passenger transportation (passenger railroads), and railroads with inadequate safety performance to develop, submit to the Secretary for review and approval, and implement a railroad safety risk reduction program. RSIA section 103(a)(4) also states that railroads not required to comply with this rule may voluntarily submit to FRA for approval an RRP plan meeting the requirements. Section 20156 codifies these provisions.

This RRP rule implements section 20156 as it applies to Class I freight railroads, freight railroads with inadequate safety performance, and voluntarily-compliant railroads. The RRP rule is a risk reduction program in that it requires subject railroads to assess and manage risk and to develop proactive hazard management methods to promote safety improvement. The rule contains provisions that, while not explicitly required by the statutory safety risk reduction program mandate, are necessary to properly implement the mandate and are consistent with the intent behind the mandate.

B. Related System Safety and Fatigue Management Plans Rulemakings

This RRP final rule addresses the RSIA sections 103 and 109 RRP mandate for Class I freight railroads and freight railroads with inadequate safety performance. Two separate rulemakings address the mandate for passenger railroads and for Fatigue Management Plans. The NPRM discussed both these rulemakings and how they related

to the RRP rulemaking. *See* 80 FR at 10955. FRA published an SSP final rule for passenger railroads on August 12, 2016. *See* 81 FR 53850.⁸

Section 20156(d)(2) states an RRP must include a fatigue management plan (FMP) that meets the requirements of section 20156(f). However, this RRP final rule does not implement this mandate because FRA is addressing FMPs in a separate rulemaking. The RSAC Fatigue Management Plans Working Group (FMP Working Group), which completed its work in September 2013, submitted its recommendations to FRA for further consideration. FRA is currently drafting an FMP NPRM.

Once FRA publishes an FMP rule, FRA will consider any FMP a railroad develops and implements under that rule part of a railroad's RRP or SSP. Before FRA issues an FMP final rule, FRA will approve RRP plans that do not contain an FMP component, if the RRP plan meets all other applicable RRP requirements. A railroad may still, however, elect to use processes and procedures in its RRP plan to address fatigue-related railroad safety issues.

C. Consultation Process Requirements

Section 20156(g)(1) states that a railroad required to establish a safety risk reduction program must “consult with, employ good faith and use its best efforts to reach agreement with, all of its directly affected employees, including any non-profit employee labor organization representing a class or craft of directly affected employees of the railroad carrier, on the contents of the safety risk reduction program.” Section 20156(g)(2) further provides that if a railroad and its directly affected employees “cannot

⁸ On August 30, 2019, FRA issued a final rule extending a stay of the SSP rule's requirements to March 4, 2020. *See* 84 FR 45683 (2019). FRA issued the stay to develop its response to various petitions for reconsideration of the SSP final rule. *Id.*

reach consensus on the proposed contents of the plan, then directly affected employees and such organizations may file a statement with the Secretary explaining their views on the plan on which consensus was not reached.” Section 20156(g)(2) further provides that FRA must consider these views during review and approval of a railroad’s RRP plan.

As proposed in the NPRM, the rule implements this mandate by requiring each railroad required to establish an RRP to consult with its directly affected employees (using good faith and best efforts) on the contents of its RRP plan. A railroad must also include a consultation statement in its submitted plan describing how it consulted with its employees. If a railroad and its employees cannot reach consensus, directly affected employees may file a statement with FRA describing their views on the plan.

Like the information protection provisions discussed below, the RRP and SSP rules have essentially identical provisions regarding the consultation process requirements because there was significant discussion during the SSP and RRP RSAC processes on how to implement section 20156(g). FRA worked with the General Passenger Safety Task Force’s System Safety Task Group to receive input on how to address the consultation process, with the understanding that FRA would include the same language in both the SSP and RRP NPRMs for review and comment. The minor differences between the consultation provisions in the RRP and SSP rules are discussed in the section-by-section analysis for § 271.207.

D. Risk Reduction Information Protection

1. Exemption from Freedom of Information Act Disclosure

In section 20118, Congress exempted railroad safety analysis records from public disclosure in response to FOIA requests. Generally, FOIA requires a Federal agency to

make most records available upon request, unless a record is protected from mandatory disclosure by one of nine exemptions. One of those exemptions, Exemption 3, applies to records specifically exempted from disclosure by statute if the statute requires the matters be withheld from the public in such a manner as to leave no discretion on the issue or establishes particular criteria for withholding or refers to particular types of matters to be withheld. *See* 5 U.S.C. 552(b)(3). *See also* 49 CFR 7.23(c)(3). The NPRM explains FRA's conclusion that section 20118 is a FOIA Exemption 3 statute and, therefore, exempts RRP records in FRA's possession from mandatory disclosure under FOIA, unless one of the two RSIA exceptions discussed above applies. *See* 80 FR at 10957-10958. FRA did not receive any comments questioning its conclusion so FRA refers interested readers to the NPRM's analysis of this conclusion. *Id.*

2. Discovery and Other Use of Risk Analysis Information in Litigation

a. The Statutory Mandate

Section 20119(a) directed FRA to conduct a study to determine whether it is in the public interest to withhold from discovery or admission into evidence in a Federal or State court proceeding for damages involving personal injury or wrongful death against a carrier any information (including a railroad's analysis of its safety risks and its statement of the mitigation measures with which it will address those risks) compiled or collected for the purpose of evaluating, planning, or implementing a risk reduction program. Section 20119(a) required FRA to solicit input from railroads, railroad non-profit employee labor organizations, railroad accident victims and their families, and the general public for the study. Section 20119(b) also states that upon completion of the study, if in the public interest, FRA could prescribe a rule addressing the results of the

study. Section 20119(b) states any such rule is not effective until one year after its adoption.

b. *The Final Study Report and Its Conclusions*

FRA contracted with a law firm, Baker Botts L.L.P. (Baker Botts), to conduct the study for FRA. Various study documents are available for review in public docket no. FRA-2011-0025, which interested parties can access online at www.regulations.gov. First, Baker Botts prepared an initial report identifying and evaluating other Federal safety programs that protect safety-related information from use in litigation. *See Report on Federal Safety Programs and Legal Protections for Safety-Related Information*, FRA, docket no. FRA-2011-0025-0002, April 14, 2011. Next, as section 20119(a) requires, FRA published a *Federal Register* document seeking public comment on whether it would be in the public interest to protect certain railroad risk reduction information from use in litigation. *See* 76 FR 26682 (May 9, 2011). Interested parties may view comments received in response to this document in the public docket.

On October 21, 2011, Baker Botts produced a final report on the study. *See Study of Existing Legal Protections for Safety-Related Information and Analysis of Considerations For and Against Protecting Railroad Safety Risk Reduction Program Information (Final Study Report)*, FRA, docket no. FRA-2011-0025-0031, Oct. 21, 2011. The Final Study Report contains analyses of other Federal programs that protect similar safety-related information, the public comments submitted to the docket, and whether it would be in the public interest, including the interests of public safety and the legal rights of persons injured in railroad accidents, to protect railroad risk reduction information from disclosure during litigation.

The Final Study Report determines that substantial support exists for the conclusion that a rule that protects “railroad safety risk information from use in civil litigation involving claims for personal injuries or wrongful death would serve the broader public interest.” *Final Study Report* at 63. The Final Study Report highlights that, in the past, with similar programs, Congress deemed it is in the public’s interest to place statutory limitations on disclosing or using certain information used by the Federal Government. *Id.* The safety risk reduction programs that RSIA mandates, according to the Final Study Report, involve public interest considerations similar to the ones Congress has protected through statutory limitations, and courts have upheld these limitations. The Final Study Report explains that many of the public comments submitted to the docket agree that limiting the use of information collected for a safety risk reduction program mandated by RSIA in discovery or litigation would serve the broad public interest by encouraging and facilitating the timely and complete disclosure of safety-related information to FRA. Further, the Final Study Report underscores FRA’s statutory duty to protect the broader public interest in ensuring rail safety and concludes that this public interest outweighs the individual interests of future litigants who may bring damage claims against railroads. Therefore, the Final Study Report concludes that

after balancing all of the considerations that bear upon the public interest . . . the balance weighs in favor of adopting rules prohibiting the admissibility or discovery of information compiled or collected for FRA railroad safety risk reduction programs in a civil action where a plaintiff seeks damages for personal injury or wrongful death.

Id. at 64.

In response to the Final Study Report, the RRP NPRM proposed in § 271.11 to protect any information compiled or collected for the sole purpose of developing,

implementing, or evaluating an RRP from discovery, admission into evidence, or consideration for other purposes in a Federal or State court proceeding for damages involving personal injury, wrongful death, or property damage. The NPRM clarified that the protected information would include a railroad's identification of safety hazards, analysis of safety risks, and statement of the mitigation measures for addressing those risks. Protected information could be in the form of plans, reports, documents, surveys, schedules, lists, data, or any other form. FRA received multiple comments in response to the information protections that both the SSP and RRP NPRM proposed and has modified its approach based on these comments. These changes are discussed further in the discussion of comments section and the corresponding section-by-section analysis.

V. Discussion of General Comments

This section discusses general comments FRA received on the RRP NPRM relating to the proposed information protections and the overall nature of the proposed rule. The section-by-section analysis discusses all other comments as they relate to specific sections, including any changes to the rule text FRA made in response.

A. Information Protection

FRA received numerous comments regarding the proposed information protections and has modified the proposed information protections based on both the received comments and the information protection provisions in the SSP final rule. As discussed in the NPRM, this RRP final rule contains an information protection provision substantively identical to the information protection provision in the SSP final rule.⁹ *See*

⁹ The minor differences between the RRP and SSP information protections involve the use of “risk reduction program” instead of “system safety program” and citations to relevant provisions in the RRP rule instead of provisions in the SSP rule. To correct a minor typo in the SSP information protection provision,

81 FR 53900 (Aug. 12, 2016). FRA believes different RRP and SSP provisions governing information protection would be confusing. Further, the SSP and RRP RSAC processes significantly discussed how to implement the information protections. FRA worked with both the General Passenger Safety Task Force's System Safety Task Group and the RRP Working Group to receive input on how the SSP and RRP rules should address information protection, with the understanding that both rules would likely contain the same language.

1. Comments Supporting the Proposed Information Protections

Several commenters agreed with FRA's conclusion that the proposed information protections are necessary, including Association of American Railroads (AAR), American Public Transportation Association (APTA), ASLRRA, Union Pacific Railroad (UP), and Labor Organizations I. These commenters support FRA's position that the litigation protections are necessary for a railroad to engage in a thorough and candid analysis of the hazards and resulting risks on its system. Based on those comments, FRA believes both railroad management and railroad labor generally agree an RRP final rule must have some form of information protections.

2. Comments on Final Study Report

Several commenters questioned the neutrality and the substance of the Baker Botts Final Study Report. Commenters questioning the neutrality of Final Study Report included American Association for Justice (AAJ), Academy of Railroad Labor Attorneys (ARLA), Labor Organizations I, Labor Organizations II, and several individuals. These commenters provided several examples of Baker Botts' alleged bias, including: (1)

the RRP information protection provision also uses the term "proceeding" instead of "proceedings." No substantive difference is intended by this correction.

citations to Baker Botts' website; (2) a book by William G. Thomas titled *Lawyering for the Railroad: Business, Law, and Power in the South* (Louisiana State University Press, 1999), which describes Baker Botts' historical representation of Southern Pacific Railroad beginning in the later 1800s until sometime in the 1900s; (3) a Baker Botts associate's prior employment with Norfolk Southern Corporation; and (4) a website indicating that Baker Botts was involved in litigation related to the July 6, 2013 rail accident in Lac-Mégantic, Quebec. The commenters did not provide a specific example of Baker Botts representing a railroad in litigation involving claims for damages at the time of the study.

After evaluating these comments, FRA concludes that it complied with all legal requirements, including the RSIA and the Federal Acquisitions Regulations (FAR), in selecting Baker Botts and conducting the study. *See* section 20119 and FAR 48 CFR 9.505 through 9.505-4 and 9.508. Further, FRA has not found any conflict or representation indicating that Baker Botts had a bias in favor of railroad management at the time of the study. For example, any involvement of Baker Botts in Lac-Mégantic-related litigation occurred after the firm completed the study in October 2011. FRA also reviewed *Lawyering for the Railroad: Business, Law, and Power in the South*. Although the book correctly states that Baker Botts represented Southern Pacific railroad beginning in the late 1800s until sometime in the 1900s, the book does not have an example of Baker Botts representing a railroad at the time of the study.

Baker Botts also conducted its own conflict check when submitting its bid in response to FRA's request for proposal (RFP)¹⁰ and only found one matter involving advice it provided to a railroad on environmental issues, not rail safety. Further, Baker Botts, as a law firm, must comply with the legal ethical standards of the appropriate State or risk discipline or disbarment of its attorneys.

AAJ, ARLA, and Labor Organizations II also submitted comments arguing that the Final Study Report did not give adequate consideration to the interests of railroad accident victims, their families, and the general public. For example, ARLA and Labor Organizations II assert the report only focuses on the railroads' alleged interests and why FRA should protect risk reduction information. FRA disagrees and believes the Final Study Report adequately considered the interests of railroad accident victims, their families, and the general public. As section 20119(a) required, FRA solicited input for the report from railroads, railroad nonprofit employee labor organizations, railroad accident victims and their families, and the general public, including AAJ. *See* 76 FR 26682 (May 9, 2011) and Letters Dated May 12, 2011, to Stakeholders Inviting Comments (FRA-2011-0025-0006). In response, FRA received 22 comments representing 25 affected entities, including railroads, AAJ, Public Citizen (a non-profit public interest organization), various railroad non-profit employee labor organizations, and individuals. The Final Study Report summarizes comments both supporting and opposing a rule that would protect risk reduction information. *See generally* Final Study Report at 37-46. The Final Study Report also analyzes the relevant public interest

¹⁰ FRA's RFP, Solicitation Number DTFR-53-10-R-00008, is available at <https://www.fbo.gov/index?s=opportunity&mode=form&id=56e2462fb07daa6e45155c3be66ddf02&tab=core&tabmode=list>.

considerations, including considerations opposing a rule limiting discovery and admissibility. *See generally Id.* at 53-63. Specifically, the Final Study Report considers: (1) victims' compensation; (2) the necessity of a regulation; (3) promoting railroad safety; (4) promoting the reporting of railroad accidents; (5) promoting open government and freedom of information; (6) what kinds of documents a regulation should protect; and (7) administrative procedure. Therefore, FRA concludes the Final Study Report adequately considered the public interest and the rights of railroad accident victims and their families.

3. Comments Against Any Information Protections

Several commenters objected to including any information protections in the final rule. These included AAJ, ARLA, the non-profit organizations represented by the Group Letter, California State Senator Wolk, Washington State Representative Farrell, the City of Portland, and several individuals and other non-profit organizations.

Overall, the primary objections of many commenters opposed to any information protections are that the protections would (1) ignore the importance of transparency in railroad safety and (2) reduce, not improve, railroad safety. FRA disagrees. First, in section 20118, Congress specifically exempted railroad safety analysis records from mandatory disclosure under FOIA, indicating that Congress concluded the benefits of improved railroad safety outweighed the benefits of complete transparency in railroad safety. Second, the information protections will not change the information available to litigants today, as information currently discoverable and admissible will remain discoverable and admissible. Further, the information protections will improve railroad safety by encouraging railroads to engage in a systematic and honest assessment of the

hazards and resulting risks on their systems. A railroad's risk-based Hazard Management Program (HMP) will not improve railroad safety if a railroad is reluctant to reveal risks and hazards because a litigant could use that information against the railroad in a court proceeding for damages.

a. *Comments That the Information Protections Are Unprecedented*

AAJ contends the proposed information protections are unprecedented. While AAJ recognizes certain existing programs have information protections, AAJ argues those programs have two key features: (1) Congress directed disclosure of documents be limited, and (2) limited disclosure applies predominately to documents actually submitted to a Federal agency. AAJ believes that the RRP information protections do not have either of these key features. ARLA also claims the safety-related statutes and regulations the Final Study Report cites only protect data a governmental agency holds, not a private entity such as a railroad. (FRA notes that not all railroads are private entities.)

While Congress did not set forth specific information protections in section 20119, Congress explicitly gave FRA authority to promulgate such protections. As discussed previously, section 20119(a) directs FRA to conduct a study to determine if certain information protections would be in the public interest, and Congress described the specific parameters of the information protections the study had to consider. Congress then authorized FRA to promulgate a rule, subject to notice and comment, which addresses the results of the study. *Id.* FRA has complied with Congress' mandate and has included information protections in this rule consistent with the specific parameters Congress described. FRA does not believe the information protections are invalid simply because Congress didn't promulgate specific protections.

Additionally, nothing in section 20119 limits the information protections to documents a railroad submits to FRA. Congress' language in section 20119 states that the information protections, depending on the results of the study, could apply to information a railroad does not submit to FRA. Under section 20119(a), the study must consider information protections that would apply to documents a railroad compiles and collects for "the purpose of planning, implementing, or evaluating a safety risk reduction program." Because Congress did not limit the information protections only to documents a railroad submits to FRA, FRA has authority to protect documents a railroad possesses.

Further, nothing in 23 U.S.C. 409 (section 409), the statute FRA used as a model for the proposed information protections, or the Supreme Court's decision in *Pierce County v. Guillen*, 537 U.S. 129 (2003) (which upheld the validity and constitutionality of section 409),¹¹ limits the information protections to documents submitted to the Federal Highway Administration (FHWA) as part of the Hazard Elimination Program. In that case, the Supreme Court did not base its interpretation of section 409 on whether documents were submitted to FHWA. Rather, the Supreme Court held the information protections extended to information because the Hazard Elimination Program required compiling or collection of that information. *See Guillen*, 537 U.S. at 146. Like the statute at issue in that case, because the RSIA requires railroads to compile and collect information for an RRP, it is appropriate to protect any information the railroad compiles or collects for that purpose, even if the railroad never submits that information to FRA.

AAJ claims that in the limited circumstances where provisions have protected data, the provisions have been narrowly tailored and construed. AAJ believes the

¹¹ For additional discussion on FRA's decision to base the RRP information protection provisions on section 409 and *Guillen*, FRA refers readers to the NPRM. *See* 80 FR 10963-10964 (Feb. 27, 2015).

proposed information protections are overly broad and inconsistent with any other government program that limits some disclosure of evidence.

FRA agrees with AAJ that the information protections must be narrowly tailored and construed. In *Guillen*, the Supreme Court recognized that “statutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for truth.” *Guillen* at 144-45. Because section 409 established a privilege, the Court construed it narrowly to the extent the text of the statute permitted. *Id.* at 145. FRA believes the RRP information protections are consistent with the Court’s narrow interpretation of section 409. Further, FRA has tailored the RRP protections even more narrowly than section 409 by limiting them to information a railroad originally compiled or collected “solely” for the purpose of planning, implementing or evaluating an RRP, as the section-by-section analysis for § 271.11 discusses.

Labor Organizations II commented that, with the exception of section 409, each safety law or regulation the Final Study Report cites allows discovery of information. FRA believes Labor Organizations II’s characterization of the Final Study Report is inaccurate because the final report identifies two additional safety statutes prohibiting both the discoverability and the admissibility of information. The first is 49 U.S.C. 6307(b)(2)(B)(i), which specifies reports submitted to DOT’s Bureau of Transportation Statistics (BTS) under 49 U.S.C. 6302(b)(3)(B) are “immune from legal process.”¹² “Accordingly, no litigant may subpoena the report in discovery or obtain it through any

¹² The Final Study Report discussed a previous version of section 6307(b)(2)(B)(i), 49 U.S.C. 111(k)(a)(2)(B)(i), repealed in 2012. *See* Pub. L. 112-141, Div. E, Title II, section 52011(c)(1), July 6, 2012, 126 Stat. 895. However, substantively, sections 6307(b)(2)(B)(i) and 111(k)(a)(2)(B)(i) are identical and have the same “immune from legal process” language. Because section 6302(b)(3)(B)(vi)(1) requires BTS to collect statistics on “transportation safety across all modes and modally,” FRA believes section 6307(b)(2)(B)(i) is a safety law.

other legal proceeding.” Final Study Report at 20. The second statute is 46 U.S.C. 6308(a), which protects from discovery marine casualty reports the U.S. Coast Guard creates under 46 U.S.C. 6301.¹³

Further, Labor Organizations II’s argument acknowledges that section 409 prohibits discovery. As discussed in the NPRM, FRA believes section 409 is the best model for the RRP information protections because Congress used similar language in section 409 and section 20119 authorizing information protection and because *Guillen* determined section 409 was constitutional. *See* 80 FR at 10963.

ARLA also commented that virtually every safety law the Final Study Report discussed has exceptions to the protection against disclosure and admissibility. FRA notes that the information protections in § 271.11 are narrowly tailored and will not provide blanket protection for all railroad RRP information. The rule excepts from protection several categories of RRP information, such as (1) information discoverable and admissible before publication of the RRP final rule, (2) information another provision of law or regulation requires the railroad to compile or collect, and (3) information a railroad does not use “solely” for an RRP purpose. Accordingly, FRA concludes this rule contains several exceptions to the information protections and is not inconsistent with other safety laws with exceptions to protections against discoverability and admission into evidence.

b. Comments That the Information Protections Will Reduce the Rights of Litigants

¹³ Because marine casualty investigations identify the cause of accidents resulting in fatalities, FRA believes section 6308(a) is also a safety law.

AAJ argues the RRP information protections will reduce the rights of persons injured in railroad accidents. AAJ asserts that evidence a railroad knew or should have known of a hazard is key in many cases to prove the railroad's liability, particularly for Federal Employers' Liability Act cases. AAJ believes the Final Study Report concluded without analysis that injured people could continue to pursue legal remedies because access to currently discoverable documents would remain discoverable. AAJ does not believe this conclusion is accurate because it contends the information protections may shield the documents/data necessary to show the railroad knew or should have known of the hazard. AAJ also commented that the information protections are one-sided because they shield the railroad from discovery, while permitting the railroad to obtain extensive discovery regarding a plaintiff's knowledge of a hazard or risk. The Chesapeake Climate Action Network (CCAN) expressed similar concerns.

FRA has drafted the RRP information protections so a plaintiff or defendant is no worse off than he or she would have been if the RRP rule never existed. This is consistent with section 409 and the Supreme Court's interpretation of that section. *See Guillen* at 146. To ensure a plaintiff is no worse off, § 271.11(b) has certain exceptions to the information protections. Under § 271.11(b), the information protections are not extended to information compiled or collected for a purpose other than that specifically identified in § 271.11(a). Further, if certain information was discoverable and admissible before the enactment of the RRP rule, § 271.11(b) ensures the information remains discoverable and admissible. This is true even if the railroad (1) continues to compile or collect that information as part of its RRP or (2) stops compiling or collecting that information outside the RRP and then begins to compile or collect that information again

as part of its RRP. These exceptions are discussed extensively in the section-by-section analysis for § 271.11(b). These exceptions strike a reasonable balance between ensuring that plaintiffs are no worse than they would have been if the RRP rule had not existed and encouraging railroads to undertake a systematic and candid assessment of the hazards and resulting risks on their system.

c. Comments That the Information Protections Will Allow Railroads to Hide Safety Hazards

AAJ asserts the information protections will allow railroads to hide safety hazards. AAJ believes the threat of disclosure of these hazards creates an incentive for railroads to correct them immediately. AAJ points to multiple cases it believes prove railroads routinely hide evidence of hazards. CCAN also argues that the information protections would allow railroads to hide knowledge of safety problems and delay correcting known or suspected hazards. Labor Organizations II express a similar concern that the information protections would prevent knowledge of future risks known by railroads. Specifically, Labor Organizations II assert the information protections would hide risks uncovered by a railroad resulting from future rulemakings.

FRA disagrees. The purpose of the RRP is for railroads to identify hazards and resulting risks and to take the appropriate measures to mitigate or eliminate these hazards. Without the information protections, an RRP could result in an effort-free tool for plaintiffs in litigation against railroads, which would discourage railroads from identifying hazards and resulting risks, thus frustrating the intent behind section 20156. The RRP rule and information protections will encourage railroads to identify and address hazards. Further, if a railroad is already required by another law or regulation to

collect information to show compliance with existing laws or regulations, that information will not be protected. Further, the information protections' narrow application to information that a railroad compiles or collects "solely" for an RRP purpose will not allow a railroad to claim that the provisions protect all information regarding risks relating to future technologies or rulemakings. Once a railroad uses such information beyond the scope of its RRP, § 271.11 will not protect the non-RRP use of the information outside the railroad's RRP. For example, if the railroad gives RRP information to a contractor to use while performing maintenance work for the railroad, § 271.11 will not extend to the contractor's use of the information. Therefore, railroads will not be able to use the RRP information protections to hide issues of non-compliance or avoid future regulatory requirements.

Several commenters also expressed concern the information protection provisions would allow railroads to hide information related to the transportation of crude oil by rail. One individual specifically commented that the RRP final rule should require railroads to provide detailed crude-by-rail information.

The information protection provisions in this final rule explicitly do not protect any information that a railroad must compile or collect "pursuant to any other provision of law or regulation." This excludes from protection any crude oil information a railroad must collect under Federal law, including (but not limited to) the Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains (HHFT Final Rule) that FRA and the Pipelines and Hazardous Materials Safety Administration (PHMSA) jointly issued. *See generally* 80 FR 26644-26750 (May 8, 2015). Further, because the HHFT Final Rule and other Federal regulations contain provisions requiring

the provision and maintenance of certain hazardous material information, FRA does not believe that this RRP final rule should impose additional crude-by-rail information requirements. *See e.g.*, DOT's Emergency Restriction/Prohibition Order, DOT-OST-2014-0067, May 7, 2014, *available at* <https://www.transportation.gov/briefing-room/emergency-order>.

4. Comments That the RRP Final Rule Does Not Need to Limit the Disclosure of Evidence

AAJ contends that FRA can issue an RRP rule without limiting the discovery of evidence, just like FAA did in its Safety Management System (SMS) rulemaking.

FRA disagrees. A significant difference between the FRA and FAA programs is the scope of statutory authority Congress gave each agency to protect information collected or maintained as part of an SMS. The FAA's authority under 49 U.S.C. 44735 limits the protection of SMS voluntarily-submitted information (such as reports, data, or other information produced or collected for purposes of developing and implementing an SMS) to protection from FOIA disclosure by the FAA. Congress similarly protects risk reduction information from mandatory FOIA disclosure in section 20118. However, Congress gave FRA authority to further protect RRP information in section 20119, which directed FRA to conduct the study and authorized FRA to issue a regulation addressing the results of that study.

As discussed above, the Final Study Report concludes that it would be within FRA's authority and in the public interest for FRA to promulgate a regulation protecting certain risk analysis information held by the railroads from discovery and use in litigation. The final report also makes recommendations for the drafting and structuring

of such a regulation. *See* Final Study Report at 63-64. Therefore, FRA determined the information protections in this final rule are consistent with the authority Congress provided in section 20119 and the conclusion of the Final Study Report.

ARLA also argues that railroads will honestly identify risks and mitigations without the information protections because labor unions will assure a railroad's compliance by participating in the identification of risks and mitigations.

FRA agrees with ARLA that employee participation in the risk-based HMP is essential and will improve a railroad's RRP. FRA does not believe, however, that employee participation alone can overcome a railroad's reluctance to fully identify hazards and risks. Further, employees and labor unions may not represent the interests of the public or other accident victims. FRA therefore believes the information protections will provide important additional encouragement for a railroad to assess its hazards and risks.

5. Comments Requesting Preservation of State Tort Law Based Claims

AAJ requests that FRA specifically preserve State tort law based claims. AAJ believes that because railroads must submit their RRP plans to FRA for approval, railroads may claim they are immune from any safety hazard claim or that FRA's approval of the RRP plan preempts any State law claim. Non-profit employee labor organizations also raised this concern in response to the SSP NPRM.

To address this issue, FRA is including § 271.301(d)(4) in the final rule, which provides that approval of a railroad's RRP plan under this part does not constitute approval of the specific actions the railroad will implement under its RRP plan and shall not be construed as establishing a Federal standard regarding those specific actions. FRA

will not approve the specific mitigation and elimination measures a railroad adopts to address identified hazards and risks. FRA also does not intend the RRP rule to preempt State standards of care regarding the specific risk mitigation actions a railroad will implement under its RRP plan. Accordingly, § 271.301(d)(4) clarifies that FRA approval of a railroad's RRP plan is not approval of any specific actions a railroad implements under that RRP plan, including any specific mitigation and elimination measures a railroad chooses.

6. Comments That a Judge Should Determine Information Admissibility

Labor Organizations II propose a compromise position where “risk reduction facts would be admissible if it is determined by a judge that the information would be ‘in furtherance of the highest degree of safety in railroad transportation.’” As Labor Organizations II explain, the phrase “in furtherance of the highest degree of safety in railroad transportation” comes from 49 U.S.C. 103(c), which is the safety standard Congress mandated FRA to follow in its administration of railroad safety.

FRA does not believe this suggestion would improve the proposed information protections. Labor Organizations II's proposal only addresses the admission of risk reduction information into evidence and does not indicate whether discovery protections are necessary. The suggestion also does not clarify when a judge should determine whether admissibility of information is in furtherance of the highest degree of safety in railroad transportation. As such, FRA believes the suggestion would lead to the type of litigation avalanche that AAJ and ARLA fear, where courts would have to routinely interpret the meaning of “in furtherance of the highest degree of safety in railroad

transportation.” Labor Organizations II’s suggestion is therefore too imprecise to implement and would lead to an increase in costly litigation.

7. Comments Suggesting FRA Should Only Protect a Railroad’s Hazard Analysis Form

One individual suggested that FRA narrowly draft the regulation to only protect a railroad’s hazard analysis form from disclosure.

FRA declines to implement this individual’s suggestion. The suggested approach would leave too much risk reduction information unprotected, resulting in inadequate information protections. For example, the suggested approach would not protect information a railroad might not include in the hazard analysis form, such as supporting data spreadsheets or candid discussions with employees about hazards and risks. The suggested approach also would not protect information a railroad uses to track the effectiveness of an implemented mitigation measure. Further, an effective RRP cannot lock important information in a hazard analysis form forever, as a railroad must use such information for other mandatory RRP components (such as its Safety Performance Evaluation or annual Internal Assessment).

Moreover, the suggested approach could encourage a railroad to claim protection for non-RRP information simply by placing it in a hazard analysis form. FRA believes, however, that information should be protected based on how the railroad is using the information (e.g., is the railroad using the information solely for RRP purposes?), not merely on whether or not the railroad included the information in a hazard analysis form.

Finally, protecting information beyond a railroad’s hazard analysis is consistent with section 20119(a), which directed FRA to study protecting RRP information in various forms, including “any report, survey, schedule, list, or data compiled or

collected” for various RRP purposes. The final rule also does not require a railroad to use a specific hazard analysis form for its RRP, so it would be unclear which document would be the “hazard analysis form.” Therefore, the information protections would be applied inconsistently based on which document was considered the “hazard analysis form.”

For these reasons, FRA declines to adopt the suggested approach.

8. *Comments That the Information Protections Are Too Narrow*

FRA received several comments arguing that the proposed information protections are too narrow. ASLRRA commented that FRA is not protecting data as Congress intended in the RSIA, asserting FRA improperly relied on section 409 and the Supreme Court’s decision in *Guillen* because both significantly predate the RSIA. Instead, ASLRRA believes that FRA should only rely on the RSIA and protect “any report, survey, schedule, list or data compiled or collected for the purpose of evaluating, planning or implementing a railroad safety risk reduction program ... including a railroad carrier’s analysis of its safety risks and its statement of the mitigation measures with which it will address those risks.” According to ASLRRA, any limitations FRA imposes on this language are inappropriate.

FRA disagrees and believes it has properly limited the scope of the information protections. As explained above, FRA believes it correctly used section 409 and *Guillen* as models for the information protections. ASLRRA provided no reason, other than age, why FRA should not consider *Guillen*’s analysis sound guidance for establishing RRP information protections.

FRA also believes ASLRRA mischaracterized Congress' intent in section 20119. Section 20119 does not directly establish parameters for protecting risk reduction information. Rather, it requires FRA to conduct a study and authorizes FRA to promulgate a rule addressing the results of that study. Section 20119(b) also does not mandate the scope of any information protections. FRA therefore concludes that the proposed information protections are consistent with Congress' intent in the RSIA to authorize FRA to decide the scope of the information protections.

ASLRRA also questions FRA's explanation in the NPRM preamble that the information protections would extend to the Short Line Safety Institute (Institute) only if FRA finds the Institute is part of a complete RRP program. *See* 80 FR 10964 (Feb. 27, 2015). Specifically, ASLRRA asserts there is no evidence small railroads will attempt to obtain approval for, or operate under, inadequate programs. FRA supports development of the Institute. FRA does not believe, however, it has authority under RSIA to extend information protections to programs that do not fully meet the requirements of this RRP final rule. Section 20119(a) (emphasis added) only mandated FRA (as delegated by the Secretary) to study protections for information "compiled or collected for the purpose of evaluating, planning, or implementing a *railroad safety risk reduction program required under this chapter*." Under the rule, a complete RRP must contain several components, including (but not limited to) a railroad's risk-based HMP and safety performance evaluation. A railroad must also comply with the rule's requirements for RRP internal assessment and external evaluations. If the Institute either does not meet all the rule's requirements for a railroad, or is otherwise not part of a railroad's broader RRP that does

meet the requirements, the Institute is neither a complete RRP nor part of a complete RRP, and the information protections may not extend to Institute information.

In a joint comment, AAR and ASLRRA (AAR/ASLRRA) commented on the NPRM's discussion in the preamble, which states § 271.11 would only protect information once FRA approves a railroad's RRP plan. They believe that approach does not make sense and would weaken the rule's protections. After reviewing the NPRM's discussion, FRA agrees with AAR/ASLRRA that the discussion in the preamble to the proposed rule does not properly reflect the scope of the information protections. *See* 80 FR 10952 (Feb. 27, 2015). In the preamble to the NPRM, FRA explained that railroads should not begin implementing an RRP plan before FRA approval, erroneously stating the information protections would not apply to information a railroad did not compile or collect for an FRA-approved RRP plan. FRA's intent was to explain that a railroad should not begin performing hazard analysis or implementing mitigation measures under its RRP plan before FRA approves the plan. However, FRA overlooked that once the information protections are in effect, but before FRA approves a railroad's RRP plan, a railroad could compile or collect information for the purpose of developing its RRP plan that should be protected. FRA therefore does not intend to limit the information protections only to information a railroad compiles or collected for an RRP plan FRA has already approved. Accordingly, § 271.11 protects information compiled or collected solely for the purpose of planning, implementing, or evaluating an RRP.

B. Other Topics

1. Transportation of Hazardous Materials

Some commenters (including Friends of the Earth, Mountain Watershed Association, and approximately four individuals) suggested that an RRP final rule should require railroads to address issues related to high-hazard flammable trains and routing of hazardous materials. One individual asserted that the RRP final rule should simply ban the transportation of Bakken crude oil, while another individual suggested constructing a tank car inspection facility on the Canadian border.

FRA shares the commenters' concerns regarding the safe transportation of large quantities of crude oil and other hazardous materials by rail, and DOT has taken numerous actions to reduce the risk to public safety and the environment posed by the movement of crude oil and other energy products by rail. A summary of those actions and more information are available online at: <https://www.phmsa.dot.gov/safe-transportation-energy-products/safe-transportation-energy-products-overview>.

DOT has also addressed the routing of hazardous materials by rail. Under 49 CFR 172.820, railroads must perform a routing analysis for HHFTs and other trains carrying certain explosives, material poisonous by inhalation, and radioactive materials. *See* § 172.820(a). At a minimum, this routing analysis must consider 27 separate safety and security factors. *See* § 172.820(d) and part 172, appendix D. FRA enforces these routing requirements under 49 CFR 209.501 and can (in consultation with PHMSA, the Transportation Security Administration, and the STB) direct a railroad to use an alternative route if the railroad's route selection documentation and underlying analysis are deficient and fail to establish that the chosen route poses the least overall safety and security risk. *See* § 209.501(a) and (d).

Because these (and other) DOT actions address hazardous materials routing and the safety of transporting crude oil by rail, FRA does not believe the RRP final rule needs to impose additional –and potentially duplicative – requirements directed at these issues. Nothing in the final rule, however, prohibits a railroad from including HHFTs and hazardous materials routing in its risk-based HMP, and many railroads may choose to do so, particularly if they find that doing so allows them to more efficiently comply with both the RRP rule and the other DOT requirements addressing hazardous materials. A railroad including HHFTs and hazardous materials routing in its risk-based HMP would still, of course, remain subject to requirements of Federal hazardous materials and rail safety laws and regulations that apply independently of this final rule. (FRA notes that the rule’s information protection provisions will not apply to any hazardous materials routing or safety information a railroad must collect under another Federal law or regulation.) FRA further notes that the mitigating actions a railroad may take to reduce the risk of any accident/incident will often be the same actions a railroad would take to reduce the risk of an accident/incident resulting in a release of hazardous materials (e.g., mitigating actions taken to prevent derailments). Finally, FRA’s approach is consistent with the RSIA, which does not specifically require a railroad to include HHFTs and hazardous materials routing in its risk analysis. *See* 49 U.S.C. 20156(c).

2. Comments on Performance-Based Rule and Flexibility

The NPRM preamble described RRP as a performance-based rule that would provide a railroad flexibility to tailor RRP requirements to its specific operations. *See* 80 FR 10950-10951 (Feb. 27, 2015). As the NPRM preamble explains, each railroad has a unique operating system and not all railroads have the same amount of resources. *Id.*

Accordingly, FRA did not propose to establish prescriptive requirements that may be appropriate for one railroad but unworkable for another. *Id.*

To clarify, the NPRM's description of RRP as a performance-based rule refers primarily to how a railroad identifies hazards and chooses strategies to mitigate risks associated with those hazards. FRA is requiring railroads to specify the performance standard (reduction in safety risk as identified in a statement defining specific, measurable goals of the RRP and describing clear strategies for reaching those goals under § 271.203(c)) but is not specifying the specific subject areas, processes, or tools to be used by the railroads in complying with the rule. The purpose of an RRP is to reduce a railroad's accidents/incidents, injuries, and fatalities, but the railroad has flexibility to identify hazards and mitigate risks in a manner best-suited to its unique system. FRA would not, for example, require a railroad to use a specific hazard analysis tool or mandate implementation of a certain mitigation strategy to address a risk. How a railroad prepares, adopts, and implements an RRP, however, is subject to minimum Federal standards, in that a railroad must support its RRP with an RRP plan that contains certain components, follow the provisions of that RRP plan, and ensure that it conducts an internal assessment of its RRP. In short, requirements for an RRP's substance are performance-based, but an RRP's process must meet certain minimum Federal standards.

Several commenters supported FRA's decision to propose a performance-based, flexible RRP rule. AAR/ASLRRA acknowledged the performance-based nature of RRP, while Amtrak commented that the final rule "needs to be performance based and flexible. It should provide the opportunity for new creative programs rather than a prescriptive checklist of requirements or conditions." DNV-GL also noted the NPRM was "to a large

extent aligned with good risk management practice in potentially hazardous industries[,]
particularly those that have learned the lessons of previous accidents and implemented
performance-based regimes of safety regulation.”

Labor Organizations I and several non-profit organizations and individuals
expressed concern that FRA described RRP as a performance-based, flexible rule. Public
Citizen Texas, for example, commented that the proposed flexibility did not comply with
the RSIA mandate.

The nature of SMS demands a performance-based, flexible RRP rule. Not every
railroad will have the same hazards and risks, and different railroads may find different
mitigation strategies equally effective for certain risks. Additionally, FRA notes that the
RRP final rule reflects every RSIA requirement (except for the portions of the RSIA
mandate the SSP final rule addresses and the FMP rulemaking will address). FRA
therefore believes that establishing an RRP final rule that is performance-based and
flexible reflects the outcome-oriented nature of SMS and meets the RSIA mandate.

Regarding Labor Organizations I’s specific comment, FRA clarifies in this
preamble that both the RRP and SSP rule provide railroads flexibility to tailor an RRP or
SSP to a railroad’s particular operations. Like the SSP rule, the RRP rule depends on a
railroad’s ability to thoroughly and candidly assess its unique hazards and risks, not the
railroad’s ability to meet certain prescriptive requirements. Rather, RRP requires a
railroad to engage in self-analysis that a railroad will conduct in conjunction with the
railroad’s directly affected employees and FRA oversight. Since no two railroads’
operations are exactly the same, no two RRP’s will be exactly the same. Further,
regardless of the amount of flexibility the RRP rule affords railroads, the directly affected

employees, including Labor Organizations I, will have an opportunity to provide input and work with the railroads on the development of the RRP plan. FRA also added provisions to the final rule clarifying that a railroad must involve its employees in the RRP. The section-by-section analysis will specifically discuss these provisions further.

3. Comments on Streamlined Safety Management System (SMS)

The NPRM preamble also described the proposed RRP rule as a streamlined version of an SMS, explaining that FRA had not included a number of components common to SMS to closely adhere to the RSIA mandate. *See* 80 FR 10959 (Feb. 27, 2015). The NPRM preamble specifically identified the following components that FRA did not propose: (1) processes ensuring that safety concerns are addressed during the procurement process; (2) development and implementation of processes to manage emergencies; (3) processes and procedures for a railroad to manage changes that have a significant effect on railroad safety; (4) processes and permissions for making configuration changes to a railroad; and (5) safety certification prior to the initiation of operations or implementation of major projects. *See* 80 FR 10959 (Feb. 27, 2015).

Generally, the non-profit organizations and individuals who expressed concern about the flexibility of the proposed RRP rule also questioned FRA's description of RRP as streamlined and asserted that the proposed RRP rule was less rigorous than the RSIA mandate, which requires a "comprehensive and systematic" safety management system. DNV-GL shared the concerns of these commenters, arguing that every element of a safety management system is important and that "it is better to have a basic program in place for every element than to be excellent in some and have no program in others." Labor Organizations I also asked to better understand why FRA was not requiring the

additional components, arguing that they would expect an RRP to contain the “proven safety systems such as the items FRA identifies.”

FRA disagrees with the commenters that the proposed rule does not comply with the RSIA mandate (except for the portions of the RSIA mandate the SSP final rule addresses and the FMP rulemaking will address). As the NPRM explained, FRA proposed a streamlined version of a safety management system “to adhere as closely as possible to the requirements of the RSIA.” *Id.* The RSIA does not mandate a full SMS¹⁴ but requires railroad RRP to contain certain components, each of which the RRP final rule also contains (as supplemented by the SSP and FMP rulemakings). The RRP final rule adequately addresses railroad safety hazards by following the RSIA mandate, particularly as the core of the program is a systematic risk-based hazard management program that includes a risk-based hazard analysis.

4. *Comments on Plan Approval*

The NPRM preamble stated FRA would only approve the processes and procedures in a railroad’s RRP plan, not the entire RRP. *See* 80 FR 10977 (Feb. 27, 2015). FRA will not, for example, approve specific mitigation measures in a railroad’s RRP plan. FRA received several comments from individuals and non-profit organizations urging FRA to approve entire RRP, not just RRP plans. These commenters were concerned FRA’s decision to only approve RRP plans represented a

¹⁴ The NPRM explained that a full SMS would contain numerous components FRA was not proposing to mandate in the RRP rule, such as a description of the railroad management and organizational structure (including charts or other visual representations) or a description of the processes and procedures used for maintenance and repair of infrastructure and equipment, rules compliance and procedures review, workplace safety, workplace safety assurance, or public safety outreach. *Id.*

diminished role for FRA implementation and oversight of RRP and did not comply with the RSIA mandate.

FRA disagrees and believes its decision to approve only RRP plans satisfies the RSIA mandate. Section 20156(a)(3) directs FRA to “review and approve or disapprove railroad safety risk reduction program plans within a reasonable period of time.”

(Emphasis added.) Further, an RRP is an ongoing program that supports continuous safety improvement. As discussed in the NPRM, “a railroad that conducts a one-time risk-based hazard analysis and does nothing further after addressing the results of that analysis will not have established a compliant RRP.” 80 FR at 10969 (Feb. 27, 2015). An RRP is not a one-time exercise. As such, FRA does not believe it is possible to meaningfully approve a railroad’s entire RRP, because an RRP should be continuously moving forward and improving. If FRA approved a railroad’s program, it would require a railroad to freeze an RRP at the moment of approval. That position is not consistent with the dynamic and changing nature of a successful RRP. FRA therefore is not changing the final rule to require FRA approval of a railroad’s RRP.

5. Comments on Fatigue Management Plans

The RSIA requires an RRP to include an FMP meeting certain requirements. The RRP NPRM did not address this mandate because FRA, with the assistance of industry stakeholders, is implementing it through the separate FMP rulemaking process.

Labor Organizations I commented that FRA was violating the RSIA mandate by failing to require FMPs in the proposed rule text and that “the proposal of the FRA to provide an unknown number of years of additional delay is the functional equivalent of

an open-ended waiver.” Labor Organizations I also commented that RSIA section 108 required FRA to promulgate a fatigue rulemaking no later than October 2011.

FRA notes that RSIA section 108 applies specifically to hours-of-service reform, not the fatigue management programs that RSIA section 103 mandates for RRP. *See* 49 U.S.C. 20156(f). As such, arguments based on RSIA section 108 are inapplicable to FMPs. Nevertheless, FRA is working to issue a proposed FMP rulemaking. As the NPRM discussed, the RSAC voted to establish the FMP Working Group to address the FMP mandate in December 2011. The FMP Working Group completed its work in September 2013 and submitted its recommendations to FRA. FRA is considering these recommendations as it develops an FMP rulemaking. Ultimately, any fatigue management plans that FRA requires pursuant to section 20156(d)(2) and (f) would be part of a railroad’s overall RRP. FRA does not believe that it is failing to meet the RSIA mandate by addressing the FMP requirements in a separate rulemaking process with stakeholder assistance. The SSP final rule takes the same approach and does not include FMP requirements. *See* 81 FR 53856-53857 (Aug. 12, 2016).

6. Comments on the RSAC Process

FRA received comments from several individuals arguing that the RSAC RRP Working Group process was flawed because it did not include an industry risk reduction analysis expert. One commenter specifically noted the RSAC process did not include participation from those in high-risk industries, including chemical shipping industries, universities, and consultants. These commenters suggested that FRA should reopen the comment period and reconsider the proposed rule based on much more information from the at-risk public and public officials and from experts on industrial SMS.

FRA declines to reopen the comment period again for several reasons. First, FRA representatives who have participated in the APTA system safety program have significant experience with industry risk reduction programs, as explained in the SSP NPRM. *See* 77 FR 55375 (Sept. 7, 2012). Railroad representatives who participated in the RSAC process also brought to the process experience with risk reduction programs. Overall, the RRP Working Group included a number of certified safety professionals, certified industrial hygienists, system safety managers, and safety directors. FRA therefore concludes that the RSAC RRP Working Group included ample expertise in the area of industry risk reduction analysis.

Second, FRA has provided the public – including public officials, private individuals, and experts on industrial SMS – ample notice and opportunity to participate in the RRP rulemaking process. The RSIA mandate first notified the public FRA must require certain railroads to implement railroad safety risk reduction programs. The Regulatory Plan and Unified Agenda of Regulatory and Deregulatory Actions (published by the Regulatory Information Service Center and made available to the public at www.Reginfo.gov) have also included the risk reduction rulemaking since the fall of 2009. *See*

http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPubId=200910&showStage=active&agencyCd=2100&Image58.x=35&Image58.y=17.

The ANPRM also solicited public comment on how FRA could best develop and implement a risk reduction regulation based on the RSIA requirements. *See* 75 FR 76345-76351 (Dec. 8, 2010). Interested persons could submit comments to the ANPRM.

FRA received 12 written comments in response to the ANPRM from a variety of entities, including railroads, industry organizations, non-profit employee labor organizations, a consulting firm, and a private citizen. The RSAC subsequently discussed in depth many of the questions and issues these comments raised.

After it published the ANPRM and the comment period closed, FRA also held two public hearings (announced in the *Federal Register*) giving interested persons an additional opportunity to present oral statements and to offer information and views on development of a risk reduction regulation in response to the ANPRM. *See* 76 FR 40320 (July 8, 2011). As with the ANPRM, the hearing testimony focused on topics the RSAC RRP Working Group continued to discuss. As noted above, FRA also held a public hearing and reopened the comment period on several occasions following the publication of the NPRM. The RSAC RRP Working Group also met to review and discuss comments received in response to the NPRM and the public hearing.

Overall, FRA concludes reopening the RRP NPRM for further consideration and comment is not necessary because the RSAC RRP Working Group contained sufficient expertise in risk reduction and because FRA provided interested risk reduction experts numerous opportunities to participate in the rulemaking process.

7. Comments on the Relationship between RRP and SSP

FRA explained in the NPRM preamble that it worked with both the RSAC RRP Working Group and the RSAC System Safety Task Group on language implementing the RSIA mandate on information protection and consultation process requirements, with the understanding the RRP and SSP NPRMs would include the same language on both issues for review and comment. *See* 80 FR 10955 (Feb. 27, 2015). As such, the RRP NPRM

did not respond to comments that FRA received in response to the SSP NPRM, but explained that FRA would consider comments responding to both NPRMs when developing the RRP final rule. *See* 80 FR 10958-10959 (Feb. 27, 2015).

Labor Organizations I objected to FRA's position, arguing that FRA had a duty to address comments on the SSP NPRM in the RRP NPRM. FRA disagrees. SSP and RRP are separate rulemakings that apply to different entities. FRA concluded, therefore, that it would be fair to allow Class I railroads and potential ISP railroads the same opportunity to respond to the proposed information protections and consultation process requirements that the passenger railroads had in responding to the SSP NPRM. Moreover, because this final rule contains the same information protection provision as the SSP final rule, it incorporates FRA's response to all comments received on the matter in both the SSP and RRP rulemakings.

8. Comments on the Short Line Safety Institute

ASLRRA commented that small railroad participation in the Short Line Safety Institute (Institute) should suffice as complete compliance with the requirements in the NPRM. According to ASLRRA, the Institute assessment process is a comprehensive review of safety practices and culture, which it believes is consistent with the intent of an RRP. ASLRRA acknowledges that a key component of an effective RRP is performance of a risk assessment and claims the Institute has teams of assessors specifically trained (using FRA-approved materials) in a well-documented safety assessment process.

ASLRRA also claims FRA would fulfill the Small Business Regulatory Enforcement Fairness Act (SBREFA) requirement to grant special considerations to small businesses by accepting participation in the Institute as satisfying RRP requirements. In response to

DOT's request for public comments on its regulatory review initiative, ASLRRRA similarly commented that FRA should utilize the Institute to work with short line railroads as the mechanism for risk reduction within the short line industry and not place unnecessary and burdensome regulations on short lines. *See* 82 FR 45750-45753 (Oct. 2, 2017) and DOT-OST-2017-0069-2666. The following discussion is FRA's response to ASLRRRA's comments discussing the Institute for both the NPRM and DOT's regulatory reform initiative.

FRA supports the development of the Institute to promote the safety of short line and regional railroad operations. However, for Institute participation to constitute an RRP, the Institute would have to fully comply with each RRP requirement this final rule establishes, which are consistent with the RSIA requirements. FRA currently cannot determine whether the Institute will fully comply with the RSIA mandate or the requirements of this final rule. For example, FRA cannot determine whether the Institute will include certain mandated components, such as an RRP plan reviewed and approved by FRA, consultation with directly affected employees on the contents of an RRP plan, annual internal assessments, and a technology implementation plan. Rather, FRA believes it is more appropriate to make this determination when reviewing RRP plans under § 271.301 of the final rule.

Further, FRA does not believe it has to accept the Institute as a fully-compliant RRP to comply with SBREFA or otherwise avoid placing unnecessary and burdensome regulations on short line and regional railroads. Because an RRP is scalable by design, a short line or regional railroad's full compliance with an RRP final rule is not likely to be as complex and comprehensive as it would be for a larger railroad. The rule will

therefore not unduly burden short line and regional railroads. The Final Regulatory Flexibility Analysis in Section VII.B further discusses how FRA has considered small business concerns in developing the RRP final rule.

9. Comments on Other SMS Programs

As both the NPRM and this preamble discuss, other Federal agencies have established or proposed SMS requirements, and SMS programs have developed to assure high safety performance in various industries, including aviation, passenger railroads, the nuclear industry, and other industries with the potential for catastrophic accidents. FRA received several comments urging FRA to consider other such SMS programs as both positive and negative models for RRP.

Transport Action Canada (TAC) commented that the effect of SMS in the Canadian railroad industry has not been positive. Specifically, TAC expressed concern that SMS-type programs such as RRP are “incapable of assuming ... the role of government in ensuring public safety.”

FRA does not believe this RRP rule will result in FRA abdicating its role ensuring railroad safety, as any alleged weakness of SMS programs in Canada does not mean SMS programs in the United States cannot be successful. The United States’ railroad safety laws and regulations are different than Canada’s, and the RRP rule will not replace or modify any of FRA’s railroad safety regulations, responsibilities, or enforcement tools. An RRP will supplement FRA oversight of railroad safety, not replace it.

Various commenters suggested other SMS programs as models for RRP, such as the United States Environmental Protection Agency’s (EPA) Risk Management Program, the Moving Ahead for Progress in the 21st Century Act (MAP-21) and the Federal Transit

Administration (FTA) approach, and the Massachusetts Toxics Use Reduction Act (TURA). FRA notes that some of these SMS programs operate very differently from the way FRA exercises its railroad safety authority. For example, States have primary responsibility for enforcing SMS programs under MAP-21 through the State Safety Oversight (SSO) Program. *See* State Safety Oversight (SSO) Program, *available at* http://www.fta.dot.gov/tso_15863.html (“The SSO program is administered by eligible States with rail transit systems in their jurisdiction. FTA provides Federal funds through the SSO Formula Grant Program for eligible States to develop or carry out their SSO programs. Under 49 U.S.C. Section 5329(e), as amended by [MAP-21], FTA is required to certify each State’s program to ensure compliance with MAP-21.”). Further, as FRA has already stressed elsewhere, this final rule hews closely to the RSIA mandate. If FRA used other SMS programs as a model for RRP, rather than the RSIA requirements, this could cause FRA to either fail to meet or exceed the limits of RSIA’s statutory mandate.

VI. Section-by-Section Analysis

FRA is adding a new part 271 to chapter 49 of the CFR. This part satisfies the RSIA requirements for safety risk reduction programs for Class I railroads and railroads with inadequate safety performance. *See* 49 U.S.C. 20156(a)(1). This part also protects certain information compiled or collected for a safety risk reduction program from admission into evidence or discovery during court proceedings for damages. *See* 49 U.S.C. 20119.

Subpart A—General

Subpart A of the final rule contains general provisions (including a formal statement of the rule’s purpose and scope) and provisions limiting the discovery and admissibility of certain RRP information.

Section 271.1 – Purpose and scope

Section 271.1 explains the rule’s purpose and scope. Paragraph (a) states the purpose of this part is to improve railroad safety through structured, proactive processes and procedures developed and implemented by railroads. Paragraph (a) also states this rule requires each affected railroad to establish an RRP that systematically evaluates railroad safety hazards on its system and manages the risks generated by those hazards to reduce the number and rates of railroad accidents/incidents, injuries, and fatalities. Except for replacing the phrase “in order to” with “to” for the purpose of streamlining the regulatory language, FRA has not changed paragraph (a) from the NPRM. As the NPRM explained, the rule does not require an RRP to address every safety hazard on a railroad’s system. For example, rather than identifying every safety hazard on its system, a large railroad could take a more focused and project-specific view of safety hazard identification. *See* 80 FR 10959 (Feb. 27, 2015).

An individual commenter suggested FRA’s RRP rule should use an “All-Hazards” approach. FRA declines to adopt this suggestion because the RSIA requires an RRP to address only “railroad safety risks” and § 271.1(a) of the final rule accurately reflects this mandate by requiring RRP’s to “systematically evaluate railroad safety hazards.” The RSIA does not authorize RRP’s that address hazards other than railroad safety hazards.

Paragraph (b) states that this part prescribes minimum Federal safety standards for the preparation, adoption, and implementation of RRP. A railroad is not restricted from adopting and enforcing additional or more stringent requirements that are not inconsistent with the rule. FRA did not receive any comments on this paragraph and adopts it as proposed.

Paragraph (c) states that the rule protects information a railroad compiles or collects solely for the purpose of planning, implementing, or evaluating an RRP. While paragraph (c) in the proposed rule specified that the rule would protect information “generated” solely for developing, implementing, or evaluating an RRP, FRA has replaced the term “generated” with the phrase “compiles or collects” to promote consistency with § 271.11. FRA has also replaced the term “developing” with the term “planning” from § 271.11. FRA made these changes only to improve clarity and consistency between this section and § 271.11 and not to make any substantive change in this part’s information protections.

Paragraph (d) explains the final rule does not require an RRP to address hazards completely unrelated to railroad safety and that fall under the exclusive jurisdiction of another Federal agency. For example, an RRP is not required to address environmental hazards that would fall under the exclusive jurisdiction of the United States Environmental Protection Agency (EPA) or workplace safety hazards that would fall under the exclusive jurisdiction of the United States Department of Labor’s Occupational Safety and Health Administration (OSHA). Paragraph (d) also explains an RRP should not address the safety of employees while performing inspections, tests, and maintenance. The only exception is where FRA has exercised its jurisdiction over the safety issue, as in

49 CFR part 218, subpart B, which establishes blue signal protection for workers. FRA will not approve any specific portion of an RRP plan that addresses hazards related to a safety issue that falls under the exclusive jurisdiction of another Federal agency unless FRA has exercised its jurisdiction over the safety issue.

Paragraph (d) of the NPRM proposed the same language regarding working conditions, but did not include the first sentence discussing hazards completely unrelated to railroad safety and that fall under the exclusive jurisdiction of another Federal agency. *See* 80 FR 10959 (Feb. 27, 2015). The NPRM preamble explained that while FRA is always concerned with the safety of railroad employees performing their duties, employee safety in maintenance and servicing areas generally falls under OSHA's jurisdiction. *Id.* The NPRM similarly explained that FRA did not intend RRP's to address environmental hazards and risks unrelated to railroad safety that fall under EPA's jurisdiction. *Id.* For example, the NPRM stated FRA would not expect a railroad's RRP to address environmental hazards regarding particulate emissions from locomotives that otherwise comply with FRA's safety regulations. *Id.*

AAR/ASLRRA commented the language in proposed paragraph (d) did not achieve clarification and specifically suggested FRA clarify its intent by precisely stating that the scope of an RRP does not include matters within OSHA's jurisdiction. AAR/ASLRRA also stated paragraph (d) did not address environmental issues under EPA jurisdiction.

To address AAR/ASLRRA's concern regarding EPA's jurisdiction, FRA changed paragraph (d) in the final rule to add the first sentence plainly stating that an RRP is not required to address hazards completely unrelated to railroad safety and that fall under the

exclusive jurisdiction of another Federal agency. The purpose of this language is to incorporate the NPRM's explanation that an RRP should not address hazards that fall exclusively under the jurisdiction of another Federal agency, such as EPA.

FRA has otherwise not changed the proposed text of paragraph (d) that relates to working conditions, as similar language appears in the SSP final rule and FRA's regulations on passenger equipment safety standards.¹⁵ See §§ 270.103(g)(4) and 238.107(c). The purpose of the language is to make clear that FRA neither intends to displace OSHA jurisdiction with respect to employee working conditions generally nor specifically with respect to the maintenance, repair, and inspection of infrastructure and equipment directly affecting railroad safety. FRA does not intend to approve any specific portion of an RRP plan that relates exclusively to employee working conditions covered by OSHA. The term "approve" is used to make clear that any part of an RRP plan that relates to employee working conditions exclusively covered by OSHA will not be approved even if the overall plan is approved. Additionally, the term "specific" reinforces that the particular portion of the plan that relates to employee working conditions exclusively covered by OSHA will not be approved; however, the rest of the plan may still be approved. If there is any confusion whether an RRP plan covers an OSHA-regulated area, FRA is available to provide assistance. The preamble to the SSP

¹⁵ While §§ 270.103(g)(4) and 238.107(c) contain reference to working conditions "as set forth in the plan," the RRP final rule does not contain this language because an RRP plan is not required to specifically address working conditions that arise in the course of conducting maintenance, repair, and inspection of infrastructure and equipment directly affecting railroad safety. FRA is also leaving the reference to FRA regulations on blue signal protection, which does not appear in the corresponding SSP language, to improve clarity. FRA does not intend this difference to indicate any substantive difference between the SSP and RRP language, as the preamble to the SSP final rule contains the same example regarding blue signal protection. See 81 FR 53870 (Aug. 12, 2016).

final rule contains this same explanation regarding SSP plans and working conditions exclusively covered by OSHA. *See* 81 FR 53871 (Aug. 12, 2016).

Overall, FRA's intent behind paragraph (d) in the NPRM and this final rule has not changed, and FRA has changed the language solely to address AAR/ASLRRA's concerns regarding clarity. The NPRM discussion of paragraph (d) therefore remains applicable to paragraph (d) in this final rule. *See* 80 FR 10959 (Feb. 27, 2015).

Section 271.3 – Application

This section sets forth application of the rule. Except for additional language in paragraph (c), this section is the same as in the NPRM. Thus, FRA is not repeating the NPRM section-by-section analysis for paragraphs (a) and (b) in this final rule, but refers interested readers to the NPRM. *See* 80 FR 10959-10960 (Feb. 27, 2017). FRA is, however, discussing comments it received regarding tourist railroads and Class II and Class III railroads in response to the NPRM.

Paragraph (b)(2) of the NPRM proposed that the rule would not apply to tourist, scenic, historic, or excursion operations, whether on or off the general railroad system of transportation. *See* 80 FR 10989 (Feb. 27, 2015). The NPRM specifically requested public comment on how an RRP final rule should address tourist operations that may create hazards for freight operations. In response, Labor Organizations I responded that FRA should require all railroads to account for tourist operations on their lines in performing the self-critical analysis and include such operations in the railroad's RRP. FRA agrees with Labor Organizations I that a railroad required to comply with this rule must account for tourist operations on its system. FRA has made changes responding to this comment in § 271.101(d), which requires railroads to identify tourist operations that

operate over the railroad's track (even if the tourist railroad is exempt from this rule) and to ensure the tourist railroad supports and participates in the railroad's RRP. The section-by-section analysis for § 271.101(d) discusses these changes further.

In this final rule, FRA added a paragraph (c) that includes language from the SSP final rule. *See* § 270.107(a)(2). This language clarifies that if a railroad contracts out significant portions of its operations, the contractor and the contractor's employees performing the railroad's operations are considered directly affected employees for this rule's purposes, including the consultation process and employee involvement requirements in §§ 271.113 and 271.207, discussed below. This language is necessary to address how directly affected employee consultation and involvement will be handled when a railroad contracts out significant portions of its operations to other entities. Contractors and contractor employees will only be considered directly affected employees when the contracts are ongoing and involve significant aspects of the railroad's operations. For example, if a railroad contracts out maintenance of its locomotive and rail cars to another entity, it is vital for the employees who are performing this maintenance to be involved in that railroad's RRP and have the opportunity to provide their valuable input on the RRP plan. Another example would be if a railroad contracts out the actual operations of its railroad to another entity. In such cases, the contracted entity and its employees operating trains on behalf of the railroad would certainly need to be part of the consultation process and otherwise involved in the railroad's RRP. If a railroad is unsure whether a contracted entity and its employees are directly affected employees for purposes of this part, FRA encourages the railroad and other interested stakeholders to contact FRA for guidance.

The Association of Tourist Railroads and Railway Museums (ATRRM) commented it supported FRA's proposed approach for tourist railroads. ATRRM commented an RRP was poorly suited to a small tourist railroad, but agreed with FRA's approach to tourist railroads that conduct their own freight operations, or which operate on RRP host railroads. ATRRM correctly understood FRA's position, and the changes made in § 271.101(d) are consistent with this position.

FRA received approximately four comments from individuals arguing that FRA should expand the scope of the RRP final rule to Class II and Class III railroads. FRA declines to incorporate this recommendation for two principle reasons. First, applying the RRP final rule to Class II and Class III railroads would go beyond the RSIA mandate and increase the number of RRP plans submitted for FRA review. FRA would therefore need more time to review all submitted plans, as well as more time to conduct external reviews of RRP. This would divert FRA resources away from Class I railroads, which have more complex operations than Class II and Class III railroads, and ISP railroads, which FRA will have determined demonstrate inadequate safety. Adhering to the RSIA mandate, which only directs FRA to require compliance from Class I railroads, passenger railroads, and railroads with inadequate safety performance, therefore represents the best and most efficient use of FRA resources. Second, the methodology for identifying railroads with inadequate safety performance will require certain Class II and Class III railroads to comply with the RRP rule. FRA also notes that Class II and III freight railroads may voluntarily comply with the final rule.

Section 271.5 – Definitions

This section contains definitions clarifying the meaning of important terms used in the rule. FRA worded the definitions carefully to minimize potential misinterpretation of the rule. Commenters on the NPRM did not have significant issues with the proposed definitions, except for a few comments FRA received on the proposed definitions of “hazard” and “safety culture,” discussed below. FRA also made changes discussed below to the definitions of “accident/incident” and “pilot project.” For definitions that did not receive any comment and have not been changed, FRA is not repeating the NPRM’s section-by-section analysis in this final rule but refers interested readers to the NPRM’s discussion. *See* 80 FR 10960-10962 (Feb. 27, 2015).

The NPRM preamble stated FRA was proposing an “accident/incident” definition identical to the definition contained in FRA’s accident/incident reporting regulations at 49 CFR part 225. *See* 80 FR 10960 (Feb. 27, 2015). However, the proposed definition did not match the part 225 definition exactly, because it did not include occupational illnesses. *See* 49 CFR 225.5. This inconsistency was merely an oversight. To correct this inconsistency and to ensure future conformity with the part 225 definition and any amendments thereto, FRA has changed the final rule’s definition to simply cross-reference the part 225 definition.

The NPRM proposed to define “hazard” as any real or potential condition that can cause injury, illness, or death; damage to or loss of a system, equipment, or property; or damage to the environment. *See* 80 FR 10989 (Feb. 27, 2015). In response, AAR/ASLRRA commented the definition of hazard did not help clarify the proposed jurisdiction statement in § 271.1(d). AAR/ASLRRA also claimed the definition places conditions that do not impact human safety or property damage squarely within the

definition of hazard. As discussed above, FRA has made changes to § 271.1(d) to clarify an RRP does not have to address safety issues that are completely unrelated to railroad safety and that fall under the exclusive jurisdiction of another Federal agency, such as EPA. This does not mean, however, an RRP should not address railroad safety hazards that could result in damage to the environment, such as a derailment that could result in a hazardous materials release. *See also* 80 FR 10959 (Feb. 27, 2015). As § 271.1(a) provides, an RRP is required to address “railroad safety hazards.” The final rule adopts the NPRM’s definition for “hazard” unchanged.

The NPRM proposed to define “pilot project” as a limited scope project used to determine whether quantitative proof suggests that a particular system or mitigation strategy has potential to succeed on a full-scale basis. *See* 80 FR 10989-10990 (Feb. 27, 2015). FRA modified this definition to replace the word “proof” with the phrase “evaluation and analysis.” FRA made this change to avoid implying that a railroad had to meet an established quantitative threshold as proof that a pilot project has potential to succeed. FRA did not intend to establish a quantitative proof threshold, and believes “evaluation and analysis” more accurately describes the purpose of a pilot project. FRA also modified this definition slightly by changing “potential to succeed on a full-scale basis” to “potential for full-scale success.” The purpose of this change is only to streamline the language, and FRA does not intend any substantive change.

The NPRM proposed defining “safety culture” as the shared values, actions, and behaviors that demonstrate a commitment to safety over competing goals and demands. This definition is the same in the final rule and was also included in the SSP rule. *See* § 270.5 and 81 FR 53863-53864 (Aug. 12, 2016). As the NPRM explained, FRA based the

definition on a research paper published by the DOT Safety Council. *See* 80 FR 10962 (Feb. 27, 2015). The DOT Safety Council developed this definition after extensive review of definitions used in a wide range of industries and organizations over the past two decades. *Id.* *See also* U.S. Dep’t of Transp., John A. Volpe Nat’l Transp. Sys. Ctr., “Safety Culture: A Significant Influence on Safety in Transportation,” 2-3 (2017), *available at* https://www.fra.dot.gov/eLib/details/L18784#p1_z50_gD_ksafety%20culture. The NPRM also acknowledged the proposed definition was different than the definition that the RRP Working Group recommended. Specifically, FRA noted that some participants during RRP Working Group discussion expressed concern that the language “over competing goals and demands” would require a railroad to make safety the ultimate priority to the exclusion of all other concerns, without providing flexibility for a railroad to balance the concerns of profit and efficiency. The NPRM explained FRA selected the proposed definition because it was important to use a definition the DOT Safety Council formulated. *See* 80 FR 10962 (Feb. 27, 2015). The definition also would not require a railroad to prioritize absolute safety over competing goals and demands (i.e., it would not require a railroad to have a perfect safety culture). Rather, FRA explained that the proposed definition merely expressed how a railroad should evaluate safety culture by measuring the extent to which a railroad emphasizes safety over competing goals and demands. *Id.*

AAR/ASLRRA responded to this discussion by commenting there was no doubt that the proposed definition requires “a commitment to safety over competing goals and demands,” because that is what the definition says. AAR/ASLRRA further suggested

that if FRA's intent was to measure the extent to which a railroad emphasizes safety over competing goals and demands, that language should be included. FRA declines to change the proposed "safety culture" definition as suggested because doing so would eliminate the benefits of having a general definition the DOT Safety Council developed and approved. There is value in establishing a shared understanding of safety culture that can be applied across many contexts, and developing a common understanding of the elements that comprise a strong safety culture can help DOT agencies have a better basis for improving safety programs, policies, and strategies. *See* U.S. Dep't of Transp., John A. Volpe Nat'l Transp. Sys. Ctr., "Safety Culture: A Significant Influence on Safety in Transportation," 2 (2017), *available at* https://www.fra.dot.gov/eLib/details/L18784#p1_z50_gD_ksafety%20culture. As explained in the NPRM, FRA also disagrees with AAR/ASLRRA and believes the definition does not require railroads to "absolutely and necessarily" demonstrate a commitment to safety over competing goals and demands but only describe how certain shared values, actions, and behaviors demonstrate such a commitment. Rather, the rule requires that a railroad design its RRP to promote and support a positive safety culture (§ 271.101(a)), develop processes for identifying and analyzing its safety culture (§ 271.105(a)), and include in its RRP plan a statement describing the railroad's safety culture and how it promotes improvements to its safety culture (§ 271.203(b)(1) and (2)).¹⁶ FRA believes these provisions generally require a railroad to define its own safety

¹⁶ The SSP rule contains similar requirements related to safety culture. *See* § 271.101(b) ("A railroad's system safety program shall be designed so that it promotes and supports a positive safety culture at the railroad."), § 271.103(b) ("This policy statement shall...[d]escribe the ... safety culture of the railroad"), and § 271.103(t) ("A railroad shall set forth a statement in its SSP plan that describes how it measures the success of its safety culture....").

culture and develop processes for analyzing and improving it. Nowhere does the RRP final rule require a railroad to establish a safety culture that absolutely prioritizes safety. For these reasons, FRA believes the definition for safety culture is appropriate.

Section 271.7 – Reserved

The NPRM proposed to include a provision on waivers in § 271.7, explaining that 49 CFR part 211 generally contains rules governing the FRA waiver process. *See* 80 FR 10990 (Feb. 27, 2015). ASLRRA commented suggesting that “it is best to have a single waiver rule to reduce confusion and increase familiarity with proper waiver procedures.” FRA agrees with ASLRRA on this issue and finds that the NPRM’s proposed provision on waivers is unnecessary because part 211 already contains the rules governing the FRA waiver process. The provision would have therefore served only as a cross-reference to part 211 and not have had any independent legal effect. The SSP final rule also does not contain its own provision on waivers. *See* 81 FR 53864 (Aug. 12, 2016). FRA has therefore not included a provision on waivers in this RRP final rule although FRA is reserving this section in case FRA decides to add such a provision in the future.

Section 271.9 – Penalties and responsibility for compliance

This section contains provisions regarding penalties and the responsibility for compliance. Except for the change discussed below, FRA adopts this section from the NPRM unchanged. Therefore, FRA refers interested readers to the NPRM discussion. *See* 80 FR 10962 (Feb. 27, 2015).

This section in the NPRM proposed a civil penalty of at least \$650 and not more than \$25,000 per violation, except for a penalty not to exceed \$105,000 that may be assessed for a grossly negligent violation or a pattern of repeated violations has created

an imminent hazard of death or injury to individuals, or has caused death or injury. *Id.* Since the NPRM was published in 2015, DOT has issued a final rule, in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990 (FCPIAA), as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act),¹⁷ that provides the 2018 inflation adjustment to civil penalty amounts that may be imposed for violations of certain DOT regulations. *See* 83 FR 60732 (Nov. 27, 2018). To avoid the need to update this section every time the civil penalty amounts are adjusted for inflation, FRA has changed this section by replacing references to specific penalty amounts with general references to the minimum civil monetary penalty, ordinary maximum civil monetary penalty, and aggravated maximum civil monetary penalty. FRA has also added language to this section referring readers to 49 CFR part 209, appendix A, where FRA will continue to specify statutorily provided civil penalty amounts updated for inflation.

While this section in the NPRM noted the final rule would include a schedule of civil penalties, FRA has decided to provide such a schedule on its website instead of as an appendix to the final rule. FRA therefore changed the final sentence of paragraph (a) in this section to direct readers to the FRA's website for a schedule of civil penalties. This penalty schedule will reflect the requirements of the final rule. Because such penalty schedules are statements of agency policy, notice and comment are not required before their issuance, and FRA did not propose a penalty schedule in the NPRM. *See* 5 U.S.C. 553(b)(3)(A). Nevertheless, FRA invited comment on what a final penalty schedule should contain. *See* 80 FR 10978 (Feb. 27, 2015). However, FRA did not

¹⁷ The FCPIAA and the 2015 Act require federal agencies to adjust minimum and maximum civil penalty amounts for inflation to preserve their deterrent impact. *See* 83 FR 60732 (Nov. 27, 2018).

receive any comments other than Labor Organizations I's comment the NPRM did not include a proposed penalty for violation of the § 271.207 requirements to consult with directly affected railroad employees using good faith and best efforts. The penalty schedule on FRA's website will include guideline penalty amounts for violations of various requirements in § 271.207.

Section 271.11 – Discovery and admission as evidence of certain information

As discussed in the Statutory Background (Section IV.D), the Final Study Report concluded that it is in the public interest to protect certain information generated by railroads from discovery or admission into evidence in litigation. Section 20119(b) provides FRA the authority to promulgate a regulation if FRA determines that it is in the public interest, including public safety and the legal rights of persons injured in railroad accidents, to prescribe a rule addressing the results of the Study.

This section establishes protections based on the Final Study Report for information a railroad compiles or collects solely for RRP purposes in Federal or State court proceedings for damages involving personal injury, wrongful death, or property damage. These protections are narrow and apply only to information generated solely for a railroad's RRP, aiming to ensure that a litigant will not be better or worse off than if the protections had never existed. FRA intends these protections to be strictly construed.

In Sections IV.D and V.A of this preamble's discussion, FRA explains the statutory background of this section, general comments on the NPRM's proposed information protections, and FRA's response to those comments. This section-by-section analysis will not revisit the general issues and comments FRA discussed above, but will focus on responding to specific comments on the proposed rule text and explaining the

final rule. The language of this section is also substantively identical to the language promulgated by the SSP final rule in § 270.105. *See* 81 FR 53900 (Aug. 12, 2016). The preamble to the SSP final rule contains a significant discussion on the protections' background. *Id.* at 53878-53879.

Under § 271.11(a) there are certain circumstances in which information will not be subject to discovery, admitted into evidence, or considered for other purposes in a Federal or State court proceeding for damages involving personal injury, wrongful death, or property damage. This information may not be used in such litigation when it is compiled or collected solely for the purpose of planning, implementing, or evaluating an RRP. Section 271.11(a) applies to information whether or not it is also in the Federal Government's possession.

FRA reformatted paragraph (a) for clarity from the NPRM. Paragraph (a) is divided into paragraphs (a)(1) and (2) after new introductory text. The formatting change does not, however, result in any substantive change to the paragraphs (a)(1) and (2). The new introductory text of paragraph (a) contains language implementing the section 20119(b) provision preventing the protections from becoming effective until one year after the adoption of the RRP rule.

Paragraph (a)(1) describes what may be considered "information" for the purposes of this section. Section 20119(a) identifies reports, surveys, schedules, lists, and data as the forms of information that FRA must consider in its study. However, FRA does not view the RSIA's list as limiting the forms of information that a rule may protect based on the study. In the statute, Congress directed FRA to consider the need for protecting information that includes a railroad's analysis of its safety risks and its

statement of the mitigation measures to address those risks. *Id.* While the railroad is not required to provide in the RRP plan that it submits to FRA the results of the risk-based hazard analysis and the specific elimination or mitigation measures it will implement, the railroad may have a specific plan within its RRP that does contain this information. Therefore, to adequately protect this type of information, the term “plan” is included in the definition of “information” to cover a railroad’s submitted RRP plan and any elimination or mitigation plans the railroad otherwise develops within its RRP. FRA also deems it necessary to include “documents” in this provision to maintain consistency and properly effectuate Congress’ directive in section 20119.

This paragraph does not protect all information that is part of an RRP; these protections will extend only to information that is compiled or collected after [INSERT DATE 365 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**] solely for purpose of planning, implementing, or evaluating a risk reduction program. The term “compiled or collected” comes directly from section 20119(a). The term “compiled” refers to information that was generated by the railroad for the purposes of an RRP; whereas the term “collected” refers to information that was not necessarily generated for the purposes of the RRP, but was assembled in a collection for use by the RRP. It is important to note for collections, only the collection assembled for RRP purposes is protected; however, each separate piece of information that was not originally generated for use by the RRP remains subject to discovery and admission into evidence subject to any other applicable provision of law or regulation. For example, if a railroad originally collected or generated information for a non-RRP use, the rule does not protect that original non-RRP information, even if the railroad afterwards collects the

information for protected RRP purposes. The rule would protect, however, the assembled collection of that information for RRP purposes.

In response to the SSP NPRM, APTA commented the rule text does not adequately explain the use of the term “solely” in the text of the regulation. *See* 81 FR 53879 (Aug. 12, 2016). APTA proposed that FRA either use a more appropriate term such as “primarily” or “initially” or that FRA define “solely” in the rule text, not just in the preamble. *Id.* FRA agrees. The use of the term “solely” is deliberate, and it is important that the term is understood as used within the four corners of the regulation. Therefore, FRA has included paragraph (a)(2), which defines the term “solely,” in both this rule and the § 270.105 of SSP final rule. *See* 81 FR 53900 (Aug. 12, 2016).

The term “solely” is intended to narrow circumstances in which the information will be protected. The use of the term “solely” means that the original purpose of compiling or collecting the information was exclusively for the railroad’s RRP. A railroad cannot compile or collect information for one purpose and then try to use paragraph (a) to protect that information because it uses that information for its RRP as well. The railroad’s original and singular purpose for compiling or collecting the information must be for planning, implementing, or evaluating its RRP in order for the protections to be extended to that information. The term “solely” also means that a railroad must continue to use the information only for its RRP. If a railroad subsequently uses, for any other purpose, information the railroad initially compiled or collected for its RRP, paragraph (a) does not protect that information to the extent the railroad uses it for the non-RRP purpose. The use of that information within the railroad’s RRP, however, will remain protected. If another provision of law or regulation requires the railroad to

collect the information, the protections of paragraph (a) do not extend to that information because the railroad is not compiling or collecting the information solely for the purpose of planning, implementing, or evaluating an RRP. For example, 49 CFR 234.313 requires railroads to retain records regarding emergency notification system (ENS) reports of unsafe conditions at highway-rail grade crossings. Those individual records are not protected by § 271.11. However, if as part of its risk-based hazard analysis a railroad collects several of its § 234.313 reports from a specific time period for the sole purpose of determining if there are any hazards at highway-rail grade crossings, this collection will be protected as used in the RRP. If the railroad decides to use the collection for another purpose other than in its RRP, such as submitting it to an ENS maintenance contractor for routine maintenance, the protections do not extend to that non-RRP use.

APTA commented that the term “sole purpose,” because it is ill-defined and railroads use safety data to make many decisions, would effectively nullify this section’s protections. APTA specifically recommended that FRA remove the phrase “sole purpose,” arguing that “if a railroad is creating and using data for safety, it should be protected.” APTA claims that it will “not be difficult for plaintiffs’ counsel to find any other use safety data has been used for,” as railroads use safety data to make procurement, personnel, and other decisions on a routine basis. FRA is declining to implement this suggestion for several reasons. First, as discussed above, FRA has concluded this section should not protect information a railroad takes from its RRP to use for other purposes, and APTA’s suggestion would allow a railroad to obtain protection for all safety information simply by incorporating it into a railroad’s RRP. Second,

FRA's changes to the information protections in § 271.11(a)(2) clarify that even if a railroad uses RRP information for other purposes, such as procurement or personnel decisions, the use of that information within the railroad's RRP remains protected. Finally, APTA's suggestion would create a discrepancy between the RRP and SSP final rules, and FRA's intent has always been to ensure the information protection provisions of both rules are consistent.

A railroad must compile or collect the information solely for the purpose of planning, implementing, or evaluating an RRP. The three terms—planning, implementing, or evaluating—come directly from section 20119(a). These terms cover the necessary uses of the information compiled or collected solely for the RRP. To properly plan and develop an RRP, a railroad will need to determine the proper processes and procedures to identify hazards, the resulting risks, and elimination or mitigation measures to address those hazards and risks. This planning will involve gathering information about the various analysis tools and processes best suited for that particular railroad's operations. This type of information is essential to the risk-based hazard analysis and is information that a railroad does not necessarily already have. In order for the railroad to plan its RRP, the protections are extended to the RRP planning stage. The NPRM used the term “developing” instead of “planning”; however, to remain consistent with section 20119(a), FRA has determined that the term “planning” is more appropriate.

Based on the information generated by the risk-based hazard analysis, the railroad will implement measures to eliminate or mitigate the hazards and risks identified. To properly implement these measures, the railroad will need the information regarding the

hazards and risks on the railroad's system identified during the development stage. Therefore, the protection of this information extends to the implementation stage.

The protections do not apply to information regarding mitigations that the railroad implements. Rather, § 271.11 protects the railroad's statement of mitigation measures, which could include various proposed and alternate mitigations for a specific hazard, that address the hazards identified by the risk-based hazard analysis. Additionally, § 271.11 protects the underlying risk analysis information that the implemented mitigation measure addresses. For example, if a railroad builds a structure to address a risk identified by the risk-based hazard analysis, this section does not protect the information regarding that structure (e.g., blueprints, contracts, permits, etc.). This section does protect, however, the underlying risk-based hazard analysis that identified the hazard and any statement of mitigations that included the structure.

The protections also do not apply to any hazards, risks, or mitigations that fall under the exclusive jurisdiction of another Federal agency. If FRA does not have jurisdiction over a hazard, risk, or mitigation, then the protections under this paragraph cannot cover that hazard, risk, or mitigation.

The railroad must also evaluate whether the measures it implements to mitigate or eliminate the hazards and risks identified by the risk-based hazard analysis are effective. To do so, it will need to review the information developed by the risk-based hazard analysis and the methods used to implement the elimination/mitigation measures. This section protects the use of this information in the evaluation of the railroad's RRP.

The information covered by this section shall not be subject to discovery, admitted into evidence, or considered for other purposes in a Federal or State court

proceeding that involves a claim for damages involving personal injury, wrongful death, or property damage. The first two situations come from section 20119(a); however, FRA determined that for the protections to be effective they must also apply to any other situation where a litigant might try to use the information in a Federal or State court proceeding that involves a claim for damages involving personal injury, wrongful death, or property damage. For example, this section prohibits a litigant from admitting into evidence a railroad's risk-based hazard analysis. Nonetheless, without the additional language: "or considered for other purposes," a litigant could use the railroad's risk-based hazard analysis for the purpose of refreshing the recollection of a witness or an expert witness could use the analysis to support an opinion. The additional language ensures that the protected information remains out of such a proceeding completely. The protections would be ineffective if a litigant were able to use the information in the proceeding for another purpose. To encourage railroads to perform the necessary vigorous risk analysis and to implement truly effective elimination or mitigation measures, the protections must extend to any use in a proceeding.

This section applies to Federal or State court proceedings that involve a claim for damages involving personal injury, wrongful death, or property damage. This means, for example, if a proceeding has a claim for personal injury and a claim for property damage, the protections extend to that entire proceeding; therefore, a litigant cannot use any of the information protected by this section as it applies to either the personal injury or property damage claim. Section 20119(a) required the study to consider proceedings that involve a claim for damages involving personal injury or wrongful death; however, to effectuate Congress' intent behind section 20156, that railroads engage in a systematic and candid

hazard analysis and develop meaningful mitigation measures, FRA has determined that it is necessary for the protections to extend to proceedings that involve a claim solely for property damage. The typical railroad accident resulting in injury or death also involves some form of property damage. Without extending the protection to proceedings that involve a claim for property damage, a litigant could bring two separate claims arising from the same incident in two separate proceedings, the first for property damages and the second one for personal injury or wrongful death, and be able to conduct discovery regarding the railroad's risk analysis and to introduce this analysis in the property damage proceeding but not in the personal injury or wrongful death proceeding. This would mean that a railroad's risk analysis could be used against the railroad in a proceeding for damages. If this were the case, a railroad would be hesitant to engage in a systematic and candid hazard analysis and develop meaningful elimination or mitigation measures. Such an approach would be nonsensical and would completely frustrate Congress' intent in providing FRA the ability to protect that information which is necessary to ensure that railroads perform open and complete risk assessments and select and implement appropriate mitigation measures. Therefore, to be consistent with Congressional intent behind section 20156, FRA is extending the protections in paragraph (a) to proceedings that involve a claim for property damage. Further, RSAC recommended in the context of the SSP rulemaking that FRA extend the protections in this way to proceedings that involve a claim for property damage. *See* 81 FR 53881 (Aug. 12, 2016).

Paragraph (b) ensures the protections in paragraph (a) do not extend to information compiled or collected for a purpose other than specifically identified in

paragraph (a). This type of information shall continue to be discoverable, admissible into evidence, or considered for other purposes if it was before the date the protections take effect. The types of information that will not receive the protections paragraph (a) provides include: (1) information compiled or collected on or before [INSERT DATE 365 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**]; (2) information compiled or collected on or before [INSERT DATE 365 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**] and continues to be compiled or collected, even if used to plan, implement, or evaluate a railroad's SSP; or (3) information compiled or collected after [INSERT DATE 365 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**] for a purpose other than specifically identified in paragraph (a) of this section. Paragraph (b) affirms FRA's meaning for the term "solely" in paragraph (a) — that a railroad may not compile or collect information for a different purpose and then expect to use paragraph (a) to protect that information just because the information is also used in its RRP. In such cases the information is unprotected and will continue to be unprotected.

Examples of the types of information that paragraph (b) applies to may be records related to prior accidents/incidents and reports prepared in the normal course of railroad business (such as inspection reports). Generally, this type of information is often discoverable, may be admissible in Federal and State proceedings, and should remain discoverable and admissible where it is relevant and not unduly prejudicial to a party after the implementation of this part. However, FRA recognizes that evidentiary decisions are based on the facts of each particular case; therefore, FRA does not intend this to be a definitive and authoritative list. Rather, FRA merely provides these as

examples of the types of information that paragraph (a) is not intended to protect after the implementation of this part.

Under paragraph (b)(2), if a railroad compiled or collected certain information that was subject to discovery, admissibility, or consideration for other purposes before the protections take effect and the railroad continues to collect the same type of information pursuant to its RRP required by this part, that information will not be protected by paragraph (a) of this section. For example, before this section takes effect and all else being equal, a litigant that would have been able to have admitted into evidence certain information the railroad compiled will still be able to have that type of information admitted after this section takes effect even if the railroad compiles the information pursuant to this rule. The protections are designed to apply only when the original purpose for the generation of the information was for an RRP required by this part. The original purpose of the generation of the information for the RRP-like programs that existed before the RRP rule would be for an RRP required by this part; therefore, such information is not protected by paragraph (a).

While objecting to any information protections whatsoever, AAJ also commented that any protections FRA does promulgate “should be clear and not result in satellite litigation.” AAJ is particularly concerned that the information protections would increase litigation and litigation costs by generating litigation over which information the rule protects or does not protect. AAJ therefore recommends that FRA should “require all applicable railroads [to] report all classes of documents that would remain discoverable.” ARLA, Labor Organizations I, and Labor Organizations II similarly urged FRA to reduce litigation costs by including a list of documents currently available for use in litigation in

the final rule. Labor Organizations I and Labor Organizations II also asked FRA to include a list of examples of information currently discoverable and admissible. AAJ, ARLA, Labor Organizations I, and Labor Organizations II all provided FRA examples of such a list either in comments or during the RRP Working Group process.

As discussed, FRA changed the proposed information protection to include a definition of “solely” that further clarifies what information § 271.11 protects and does not protect. FRA does not, however, believe that AAJ’s proposal to require all railroads to report documents that remain discoverable or include lists of discoverable information as other commenters suggested would be effective. First, the suggested approach does not account for future information railroads will compile or collect the information for non-RRP purposes, which § 271.11 will not protect. Railroads also cannot predict what future statutes or regulations will require them to collect information. Such reports or lists, therefore, would fail to include vast swathes of future information that should be discoverable. Further, courts are responsible for determining which documents are discoverable under the applicable rules of discovery and evidence, not railroads. In addition, the commenters have not suggested how FRA would ensure a railroad accurately reported which documents would remain discoverable or how FRA would update lists. FRA therefore declines to require railroads to report documents that will remain discoverable and declines to publish lists of discoverable documents.

This section is not intended to replace any other protections provided by law or regulation. Accordingly, paragraph (c) states the protections in this section will not affect or abridge in any way any other protection of information provided by another provision of law or regulation. Any such provision of law or regulation shall apply independently

of the protections provided by this section. While the NPRM did not propose this provision, FRA believes this language should be non-controversial. The SSP final rule also contains the same language. *See* 81 FR 53882 (Aug. 12, 2016).

Paragraph (d) clarifies that a litigant cannot rely on State discovery rules, evidentiary rules, or sunshine laws to require the disclosure of information protected by paragraph (a) in a Federal or State court proceeding for damages involving personal injury, wrongful death, or property damage. This is the same language that proposed paragraph (c) in the NPRM contained. Because FRA did not receive any comments on this proposal, FRA refers readers to the NPRM's discussion. *See* 80 FR 10966 (Feb. 27, 2015).

Paragraph (e) contains new language clarifying that § 271.11 does not protect information during civil or criminal law enforcement proceedings. For example, § 271.11 would not apply to a civil or criminal action brought to enforce Federal railroad safety laws, or proceedings such as a civil action brought by the Department of Justice under the Clean Water Act to address a discharge of pollutants into waters of the United States following a rail accident. Because paragraph (a) of this section plainly states that the information protections apply to "Federal or State court proceeding for damages involving personal injury, wrongful death, or property damage," FRA believes a court would not find that the protections apply to a civil or criminal enforcement case. Nevertheless, to help ensure no attempt is made to rely on the rule's information protections in a civil or criminal enforcement proceeding, paragraph (e) explicitly states that § 271.11 does not apply to civil or criminal enforcement actions. FRA plans to similarly clarify the information protection provision in § 270.105 of the SSP rule, which

also apply only to Federal or State court proceedings for damages involving personal injury, wrongful death, or property damage.

The NPRM proposed that FRA might extend the information protections in an SSP final rule to the RRP final rule. The effect of this approval would have been that the protections for the RRP final rule would be applicable one year after publication of the SSP final rule. FRA sought comment on this proposal, and AAR/ASLRRA commented in support. AAJ, however, objected to FRA's proposal to use the information protection provisions in the SSP final rule to protect RRP information. AAJ stated FRA's proposal would "prematurely curtail the rights of rail accident victims" and "cut short the full regulatory process on the Risk Reduction Rule." Instead, AAJ suggests FRA should stay the effective date for the SSP final rule until the RRP final rule goes into effect.

Upon further consideration, FRA determined this final rule should implement the information protections for RRP, not the SSP final rule. Section 20119(b) (emphasis added) states "Any such rule prescribed pursuant to this subsection shall not become effective until 1 year after its adoption." Thus, FRA concluded the RSIA requires each rule implementing information protections to have its own independent implementation timeline. FRA believes this approach is a better and more reasonable interpretation of Congressional intent in section 20119(b). Further, the modified approach ensures FRA has complied with notice and comment procedures of the Administrative Procedure Act for both the RRP and SSP rulemakings.

Section 271.13 – Determination of inadequate safety performance

This section describes how FRA will determine which railroads must comply with this rule because they have inadequate safety performance. This section explains that

FRA's analysis has two phases: a statistically-based quantitative analysis phase and then a qualitative assessment phase. Only railroads identified as possibly having inadequate safety performance in the quantitative analysis will continue to the qualitative assessment, as discussed further below.

The RSIA directs FRA to require railroads with inadequate safety performance (as determined by FRA) to develop and implement an RRP. *See* 49 U.S.C. 20156(a)(1). Before publishing the NPRM, FRA discussed potential definitions of inadequate safety performance during RSAC Working Group meetings and conference calls. Based on these discussions, which explored various ASLRRA concerns, FRA developed a methodology to determine inadequate safety performance. FRA received tentative agreement from the RRP Working Group on this methodology, but did not seek consensus.

The RRP NPRM proposed a two-phase annual process FRA would use to determine if a railroad's safety performance was inadequate. The proposed process would evaluate only railroads not already complying with an SSP or RRP rule, including voluntarily-compliant railroads.

For the first phase of the process, FRA proposed conducting a statistical quantitative analysis to determine a railroad's safety performance index. This quantitative analysis would use railroad data maintained by FRA from the three full calendar years before the analysis. As proposed, the quantitative analysis would utilize the following four factors: (1) on-duty employee fatalities; (2) FRA reportable on duty employee injury/illness rate; (3) FRA reportable accident/incident rate; and (4) FRA violation rate. The proposed quantitative analysis would specifically identify railroads

that either had a fatality or were at or above the 95th percentile in at least two of the three other factors.

For the second phase of the process, FRA proposed performing a qualitative assessment of railroads that the quantitative analysis identified as warranting further review. FRA proposed notifying a railroad identified for the qualitative assessment and providing it an opportunity to comment and submit documentation supporting any claim that it has adequate safety performance. FRA also proposed requiring an identified railroad to inform its employees of the FRA notification so that the employees could submit confidential comments on the matter directly to FRA. FRA's qualitative analysis would then consider comments from the railroad and the railroad's employees, as well as any other pertinent evidence, in determining the railroad's safety performance. Following the qualitative assessment, FRA would inform an identified railroad whether or not it must comply with the RRP rule.

As an initial matter, FRA notes the language in this section in the final rule uses the present tense, while the proposed rule used future tense. This change does not affect the substance of this section.

The National Safety Council (NSC) commented that programs like RRP are "essential safety tools for all companies, irrespective of past safety performance." NSC claims that railroads that wait to implement an RRP until identified with inadequate safety performance are "weak links in the system" and that creating an inadequate safety performance threshold for smaller railroads will make RRP compliance punitive, rather than a "safety best practice that benefits all railroads and is part of normal planning and operations." NSC suggests that all railroads should be encouraged to implement RRP's,

and that FRA should determine which railroads' safety performance warrants additional regulatory oversight.

FRA agrees with NSC that encouraging all railroads to implement risk reduction programs is important. As mandated by section 20156(a)(4), and as proposed in the NPRM, this final rule allows railroads to voluntarily comply. This final rule's information protection provisions will also encourage voluntary RRP compliance by ensuring that information a railroad compiles or collects solely for RRP purposes is not discoverable or admissible in certain litigation proceedings. While this final rule encourages voluntary compliance, FRA must fulfill the clear RSIA mandate to require RRP compliance for railroads with inadequate safety performance, as determined by FRA. FRA therefore concludes that this final rule encourages voluntary compliance while also meeting the RSIA mandate to require compliance for railroads demonstrating inadequate safety performance.

In response to both the NPRM and DOT's regulatory review initiative, ASLRRRA expressed concern that the methodology proposed in the NPRM for identifying railroads with inadequate safety performance would result in a disproportionate number of the smallest railroads being selected simply because they have a lower number of employees. To assess this concern, FRA conducted several analyses of data from FRA's Rail Accident/Incident Reporting System (RAIRS), the system that would provide the data for determining which railroads demonstrate inadequate safety performance. To approximate the NPRM's proposed methodology, FRA conducted the analyses for the 3-year period from 2016 through 2018, the latest years for which a full 12 months' data were available at the time of the analysis.

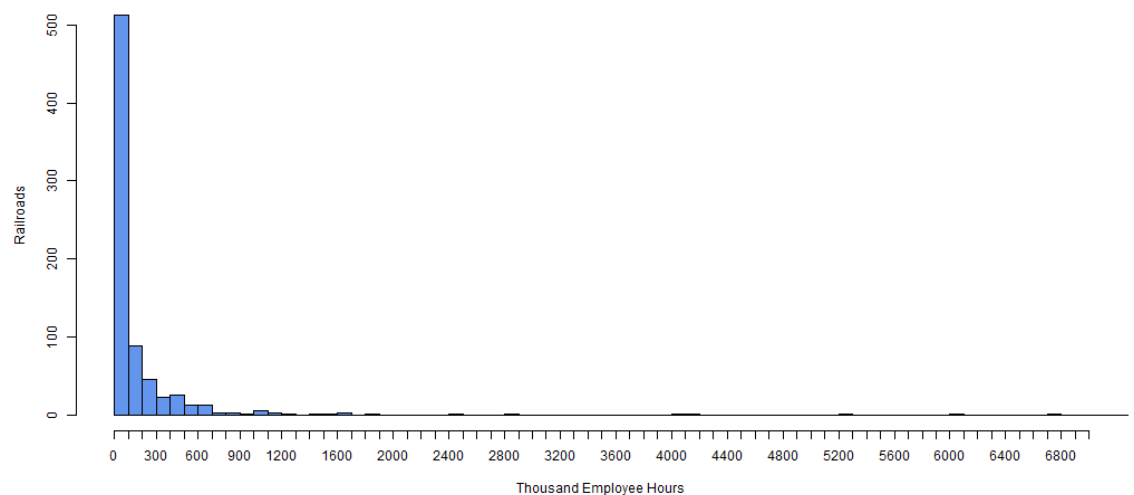
As part of the first analysis, FRA identified all Class II and Class III railroads the NPRM’s methodology would analyze for inadequate safety performance (all Class II and III railroads that would be subject to the rule; a total of 745 railroads). For these railroads, FRA used data from 2016 through 2018 to calculate: (1) the average total train miles operated, and (2) average total employee hours. FRA then calculated the same averages for the 11 railroads within the group of 745 that reported an employee fatality and the other 734 railroads that did not report an employee fatality during that same time period. As Table 3 shows, between 2016 and 2018, the entire pool of 745 Class II and Class III railroads reported an average of 213,466 total train miles operated and 168,476 employee labor hours. The 11 railroads reporting an employee fatality had substantially higher averages, with 3,147,087 train miles operated and 2,081,274 employee hours, while the 734 railroads without an employee fatality reported an average of 169,501 total train miles operated, and 139,810 employee labor hours, which is substantially below the overall averages for the entire population of 745 railroads.

Table 3. Operational data of Class II and Class III freight railroads between 2016 and 2018.			
	Number of railroads	Average Train Miles	Average Employee Hours
Railroads on which employee fatalities occurred	11	3,147,087	2,081,274
Railroads without employee fatalities	734	169,501	139,810
All	745	213,466	168,476

Figure 1 contains a histogram showing the distribution of Class II and Class III railroads by reported employee labor hours between 2016 and 2018. Each tick mark along the x-axis represents a range of employee hours. The bar heights along the y-axis

illustrate the number of railroads that reported employee labor hours within a given range of employee hours. Figure 1 demonstrates that the vast majority of Class II and III railroads report approximately 100,000 annual employee labor hours.

Figure 1. Distribution of Class II and Class III railroads by employee labor hours reported between 2016 and 2018.



Figures 2 and 3 show the distribution of Class II and Class III railroads by train miles reported between 2016 and 2018. (FRA has broken this data into 2 separate charts to ensure legibility). The number of train miles reported during this period ranged from zero to about 15 million. As with Figure 1, the bar heights along the y-axis in Figures 2 and 3 indicate how many railroads reported train miles in the ranges along the x-axis. Figures 2 and 3 demonstrate that the vast majority of Class II and Class III railroads reported 100,000 train miles or less between 2016 and 2018.

Figure 2. Distribution of Class II and Class III railroads by train miles reported between 2016 and 2018, for railroads reporting fewer than 5 million train miles.

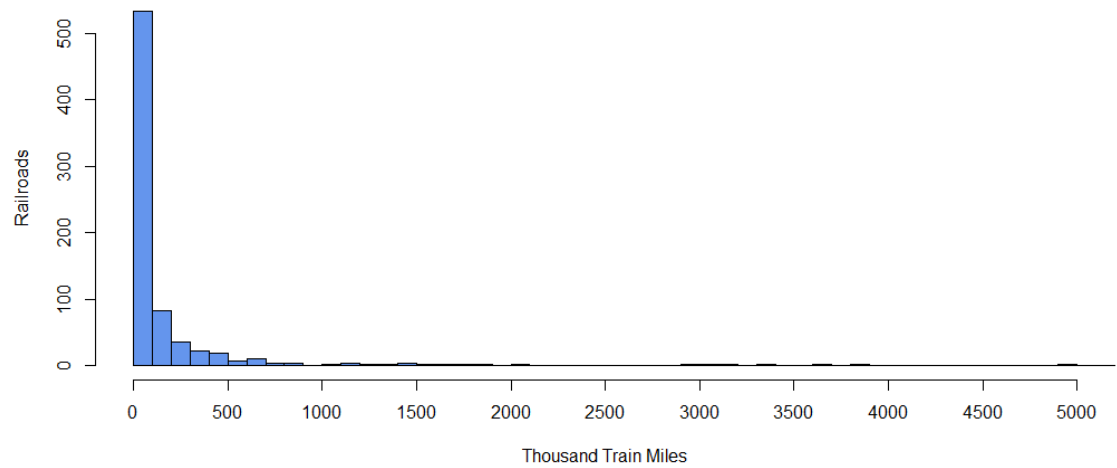
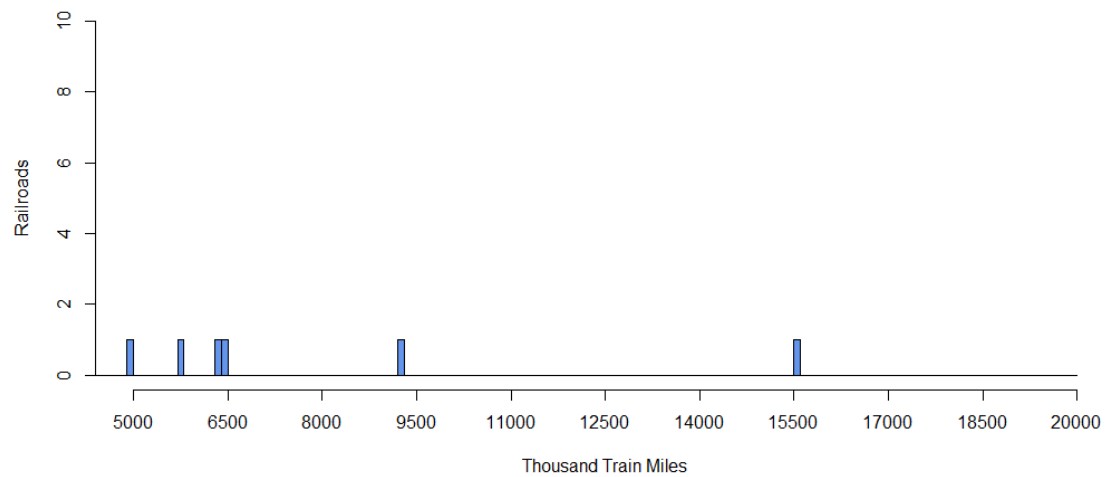


Figure 3. Distribution of Class II and Class III railroads by train miles reported between 2016 and 2018, for railroads reporting more than 5 million train miles.



The data presented in Table 1, as well as the illustrations in Figures 1, 2, and 3, strongly suggest that the overall averages for Class II and Class III railroads are influenced by a small number of larger Class II or Class III railroads.

As a second analysis, FRA used the NPRM's quantitative analysis methodology to evaluate the 734 Class II and III railroads that did not report an employee fatality. FRA excluded the 11 railroads that reported an employee fatality from this analysis because the NPRM's quantitative analysis would automatically advance them to the qualitative assessment. *See* 80 FR 10967 (Feb 27, 2015). Using the NPRM's quantitative analysis methodology, FRA identified railroads for further analysis (i.e., identified railroads for qualitative assessment) and found that these railroads reported an average 24,645 total train miles and 43,040 employee hours between 2016 and 2018. *See* Table 4. These averages are substantially lower than averages for both the entire pool of Class II and Class III railroads (*see* Table 3) and the pool of railroads not reporting an employee fatality. FRA believes that the population of railroads selected for further analysis should, with respect to size, resemble the overall population from which they were drawn. The fact that the railroads selected by the NPRM's methodology are so different from the overall population of Class II and Class III railroads indicates that the NPRM's quantitative analysis potentially over-identified smaller railroads for the qualitative assessment.

Despite the numbers above, FRA considered the possibility that the NPRM's quantitative analysis fairly identified smaller Class II and Class III railroads as possibly demonstrating inadequate safety performance. Accordingly, FRA conducted a third analysis to test this possibility. In this analysis, FRA compared the number of railroads selected under the NPRM's proposed quantitative analyses methodology with the number of railroads reporting accidents but no fatalities (the majority of railroads selected using the NPRM methodology were included in part because of their accident rates). As Table

4 shows, the population of all railroads on which a nonfatal train equipment accident/incident occurred reported an average of 390,091 total train miles and an average of 348,824 employee labor hours between 2016 and 2018. This suggests that the railroads with inadequate safety performance should not only be the smaller railroads. For example, assuming a full-time employee works 2080 hours per year, the railroads selected for qualitative assessment using the NPRM's methodology averaged 7 employees each, while the railroads experiencing a nonfatal train equipment accident/incident between 2016 and 2018 had an estimated 56 employees on average. Based on this result, FRA shares ASLRRRA's concern that the proposed methodology would over-select the smallest railroads.

Table 4. Comparison of data for railroads identified by the NPRM's quantitative analysis (excluding those with at least one fatal accident between 2016-2018) and data for all Class II and Class III freight railroads on which nonfatal train accidents/incidents occurred.			
Class II and Class III Railroads, 2016-2018	Number of railroads	Average Train Miles	Average Employee Hours
Railroads selected under the NPRM-proposed method	12	24,645	43,040
Railroads with nonfatal train accidents/incidents	204	390,091	348,824

Therefore, as explained below, FRA has changed the quantitative analysis methodology to avoid over-selecting the smallest railroads for the qualitative assessment. Applying the changed methodology to RAIRS data, railroads identified for quantitative assessment on average reported 106,520 train miles operated and 258,881 employee hours from 2016 through 2018. These averages are much closer to the averages for the entire pool of Class II and III freight railroads that the quantitative analysis will initially evaluate. As Figures 4 and 5 show, 10 out of 12 railroads identified for qualitative

assessment using the NPRM's quantitative analysis reported under 50,000 total train miles, but only 4 out of 15 railroads identified using the final rule's quantitative analysis methodology reported under 50,000 total train miles operated.

Figure 4. Number of railroads without fatalities identified for further analysis by the NPRM's quantitative analysis by total train miles (2016-2018).

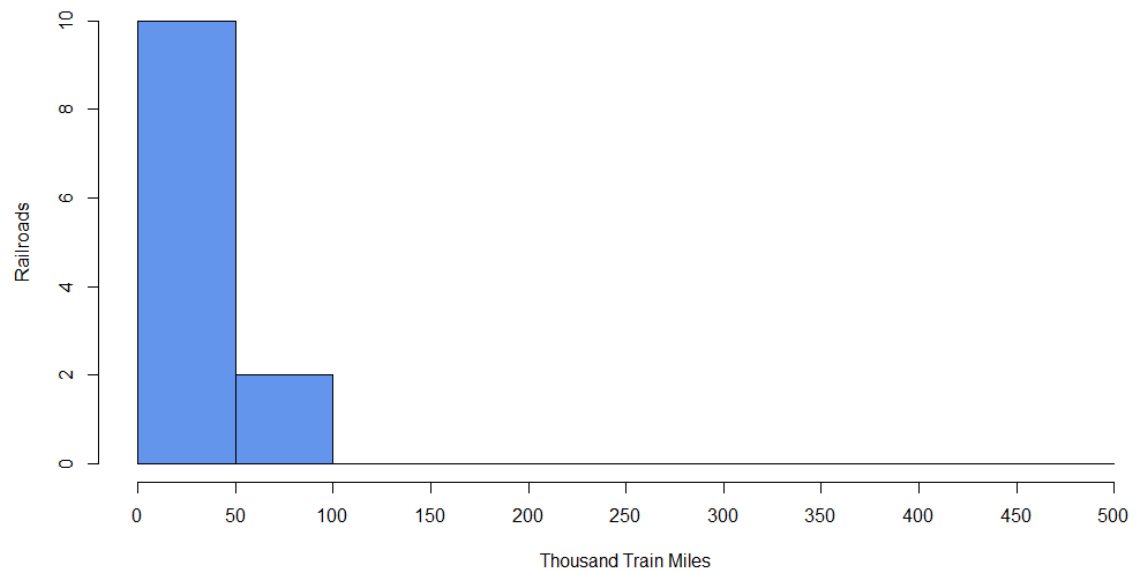
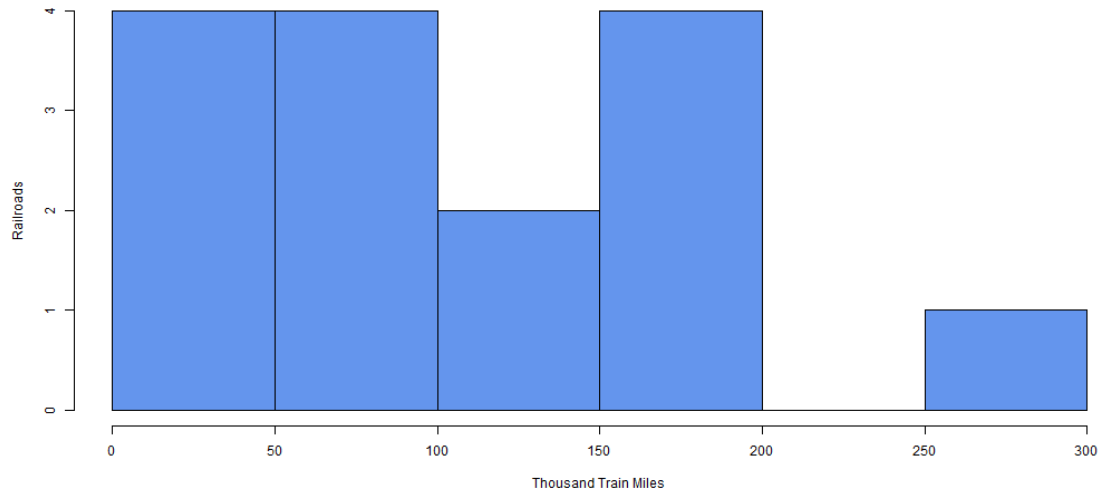


Figure 5. Number of railroads without fatalities identified for further analysis by the final rule's quantitative analysis by total train miles (2016-2018).



These numbers suggest that the changed quantitative analysis method is less likely to identify railroads for qualitative analysis that are statistical outliers or aberrations due solely to their small size. FRA discusses the specific changes it has made to the rule text to reflect the new methodology (and other changes) in the section-by-section analysis below. For clarity, FRA is discussing each provision of this important section, even where FRA did not change certain provisions from the NPRM.

Paragraph (a) describes FRA's methodology as a two-phase annual analysis, comprised of both a quantitative analysis and a qualitative assessment. This analysis will not include railroads excluded under § 271.3(b) (e.g., commuter or intercity passenger railroads that are subject to FRA SSP requirements), railroads otherwise required to comply with this rule (i.e., Class I railroads and railroads previously determined to have inadequate safety performance under this section), railroads that voluntarily comply with this rule under proposed § 271.15, and new railroads that have reported accident/incident data to FRA for fewer than three years. However, paragraph (a)(2) states FRA will include new railroads formed through an amalgamation of operations (for example,

railroads formed through consolidations, mergers, or acquisitions of control) in the analysis using the combined accident/incident data of the pre-amalgamation entities.

Paragraph (b) describes the quantitative analysis, which makes a threshold identification of railroads that might have inadequate safety performance. This paragraph includes a preliminary selection FRA has added to the quantitative analysis to both address ASLRRA's concern that the NPRM's proposed methodology would over-select the smallest railroads and to filter out railroads with small enough operations that the rate-based analysis would lack statistical stability. This preliminary selection will help avoid over-selecting the smallest railroads by utilizing the absolute number (rather than rates) of two factors regarding a railroad's safety performance; FRA selected the specific factors in response to comments from the ASLRRA during RSAC discussions. Addition of the preliminary selection resulted in FRA reorganizing several paragraph (b) NPRM provisions. Paragraph (b)(1) specifies the quantitative analysis will be statistically-based and include each railroad within the scope of the analysis using historical safety data FRA maintains for the three most recent full calendar years. The quantitative analysis will include both the added preliminary selection and a rate-based analysis, and only railroads the preliminary selection identifies will proceed to the rate-based analysis.

Paragraph (b)(1)(i) describes the preliminary selection FRA has added to the quantitative analysis. The first factor for the preliminary selection, in paragraph (b)(1)(i)(A), is a railroad's number of worker on duty fatalities during the 3-year period, determined using Worker on Duty—Railroad Employee (Class A), Worker on Duty—Contractor (Class F), and Worker on Duty—Volunteer (Class H) information reported on FRA Form 6180.55 under FRA's accident/incident reporting regulations in part 225.

The second factor for the preliminary selection, in paragraph (b)(1)(i)(B), is a railroad's number of FRA reportable worker on duty injuries/illnesses during the 3-year period, calculated using "Worker on Duty—Railroad Employee", Worker on Duty—Contractor (Class F), and Worker on Duty—Volunteer (Class H) information reported on FRA Form 6180.55 under FRA's accident/incident reporting regulations in part 225, added to a railroad's number of FRA reportable rail equipment accidents/incidents during the 3-year period, using information reported on FRA Form 6180.54.

For railroads with operations large enough for rates to be statistically stable, FRA believes that using rates enables a fair comparison between operations that might otherwise be very different in size. As paragraph (b)(1) explains, FRA will perform the next rate-based analysis only on railroads the preliminary selection identifies. The rate-based analysis will incorporate three factors regarding a railroad's safety performance. The first factor, described in paragraph (b)(1)(ii)(A) (proposed paragraph (b)(1)(i) in the NPRM), is a railroad's number of on-duty employee fatalities during the 3-year period, using Worker on Duty—Railroad Employee (Class A) Worker on Duty—Contractor (Class F), and Worker on Duty—Volunteer (Class H) information reported on FRA Form 6180.55 under FRA's accident/incident reporting regulations in part 225.

The second factor, described in paragraph (b)(1)(ii)(B) (proposed paragraph (b)(1)(ii) in the NPRM), is a railroad's FRA Worker on Duty injury/illness rate, calculated using Worker on Duty—Railroad Employee (Class A) Worker on Duty—Contractor (Class F), and Worker on Duty—Volunteer (Class H) information reported on Form 6180.55 under FRA's accident/incident reporting regulations in part 225. FRA will calculate this rate using the following formula:

$$\text{Injury/Illness Rate} = (\text{Total FRA Reportable Worker on Duty Injuries} + \text{Total FRA Reportable Worker on Duty Illnesses over a 3-year Period}) \div (\text{Total Employee Hours over a 3-year Period} / 200,000)$$

This calculation gives the rate of employee injuries and illnesses per 200,000 employee hours calculated over a 3-year period.

In the NPRM, the calculation for this factor specified “Total FRA Reportable On Duty Employee *Occupational* Illnesses over a 3-year period” (emphasis added). FRA is removing the term “occupational” from the calculation in the final rule because part 225 does not always use the term “occupational illness.” For example, Form 6180.55 is titled “Railroad Injury and Illness Summary.” For clarity, FRA is phrasing the requirement in terms of illnesses a railroad must report using Form 6180.55. This change does not affect the substance of this provision.

Additionally, while the NPRM proposed also using information reported on Form 6180.55a (which a railroad must file for each reportable injury or illness) for both the first and second factors of the quantitative analysis, FRA decided the summary information reported on Form 6180.55 is sufficient for these calculations. This change also does not affect the substance of this provision.

AAR/ASLRRA (jointly) and ASLRRA (independently) commented that fatalities and injuries should only count if they relate to the operation of a railroad (i.e., not natural causes, suicides, etc.). AAR/ASLRRA also commented that few Class III railroads approach the 200,000-person-hour denominator in the employee injuries and occupational illnesses calculation, which can skew results. While FRA generally agrees fatalities that do not relate to railroad operations are not necessarily indicative of

inadequate safety performance, the quantitative analysis in paragraph (b) is merely a threshold determination and cannot account for every mitigating circumstance. As such, the qualitative assessment paragraph (c) establishes (discussed below) gives a railroad (and railroad employees) the opportunity to provide any such mitigating information regarding the railroad's number of fatalities, and FRA will consider that information when making its final determination. Regarding AAR/ASLRRA's concern that the 200,000-person-hour denominator would skew results for small railroads, although FRA does not agree that a scaling factor alone induces sampling bias, FRA does agree that the results of the quantitative analysis presented in the NPRM did over-select the smallest railroads. FRA therefore added the preliminary selection to the quantitative analysis to avoid over-selecting the smallest railroads, as discussed above.

The third factor, described in paragraph (b)(1)(ii)(C) (proposed paragraph (b)(1)(iii) in the NPRM), is a railroad's FRA reportable rail equipment accident/incident rate, calculated using information reported on FRA Form 6180.54 and Form 6180.55. FRA will calculate this rate using the following formula:

$$\text{Rail Equipment Accident/Incident Rate} = \frac{\text{Total FRA Reportable Rail Equipment Accidents/Incidents over a 3-year Period}}{(\text{Total Train Miles over a 3-year Period} / 1,000,000)}$$

This calculation gives the rate of rail equipment accidents/incidents per 1,000,000 train miles calculated over a 3-year period.

Paragraph (b)(1)(iv) of the NPRM proposed a fourth factor for the rate-based analysis: a railroad's FRA violation rate, calculated using FRA's field inspector data system. AAR/ASLRRA and ASLRRA commented that the proposed violation rate factor

was meaningless because many violations relate to records or are dropped by FRA due to mitigating circumstances or failure to adequately document the violation. In response to DOT's regulatory review initiative, ASLRRRA also commented that including violations, which are at an inspector's discretion, could be utilized to ensure a short line's inclusion. FRA's analysis suggests that a very small number of railroads were selected for qualitative assessment because of violation rates, and that removing this factor would likely not materially affect the number of railroads that are determined to have inadequate safety performance. Given the commenters' concerns and the negligible effect of removing this factor, in this final rule, FRA is not including a railroad's FRA violation rate as a factor in the rate-based analysis. To the extent a railroad's FRA violations may indicate inadequate safety performance, FRA will consider them as "other pertinent information" during the qualitative assessment, as discussed below in the section-by-section analysis for paragraph (c)(2) of this section.

Paragraph (b)(2)(i) states the preliminary selection will identify a railroad for rate-based analysis if the railroad meets at least one of two conditions. The first condition is when a railroad has one or more fatalities. FRA considers an on duty employee fatality a strong indication of inadequate safety performance. If a railroad has at least one fatality within the 3-year period of the quantitative analysis, FRA will examine that railroad further in the rate-based analysis.

The second condition is when a railroad was at or above the 90th percentile in the factor described in paragraph (b)(1)(i)(B) of this section (e.g., the sum of a railroad's FRA injury/illness count and its FRA accident/incident count). For example, if the scope

of data includes a set of 100 railroads, FRA would identify the railroads with the ten highest total injury/illness and accident/incident count.

For railroads that advance to the rate-based analysis from the preliminary selection, the rate-based analysis will identify railroads as possibly having inadequate safety performance based on the factors described in paragraph (b)(2)(ii). Paragraph (b)(2)(ii) (proposed paragraph (b)(2) in the NPRM) states the rate-based analysis will identify a railroad as possibly having inadequate safety performance if at least one of two conditions is met. The first condition, described in paragraph (b)(2)(ii)(A), is when a railroad has one or more fatalities. As stated above regarding the preliminary selection, FRA considers an on-duty employee fatality a strong indication of inadequate safety performance. If a railroad has at least one fatality within the 3-year period of the quantitative analysis, FRA will examine that railroad further in the qualitative assessment.

AAR/ASLRRA commented paragraph (b)(2)(i) in the NPRM stated the quantitative analysis would identify a railroad if the “railroad has one or more fatalities,” without reference to the 3-year period. Corresponding paragraph (b)(2)(ii)(A) in the final rule clarifies that the rate-based analysis will identify a railroad if it has one or more fatalities “as calculated in paragraph (b)(1)(ii)(A).” Because paragraph (b)(1)(ii)(A) specifically references the 3-year period, the final rule clarifies the 3-year period applies when identifying railroads with one or more fatalities.

The second condition, described in paragraph (b)(2)(ii)(B), is when a railroad is at or above the 90th percentile in either of the factors described in paragraphs (b)(1)(ii)(B) and (C) of this section (e.g., a railroad’s injury/illness rate, or FRA accident/incident

rate). FRA will examine further those railroads identified in one or more of these factors in the qualitative assessment. Paragraph (b)(2)(ii) in the NPRM proposed that the quantitative analysis would identify for further analysis railroads at the 95th percentile in at least two of three factors. (The third factor was a railroad's FRA violation rate, which FRA has removed from the rate-based analysis as discussed above.) The NPRM explained that this percentile would identify approximately 42 railroads over a five-year period, and that FRA considered this a reasonable pool of railroads to examine further in the qualitative assessment. *See* 80 FR 10967 (Feb. 2015). While FRA still believes this is a reasonable number of railroads to examine in the qualitative analysis, the addition of the preliminary selection to the ISP determination process will reduce the number of railroads considered in the rate-based analysis. The removal of a railroad's FRA violation rate from consideration will also reduce the number of factors considered when identifying railroads for the qualitative assessment. To obtain a similar pool of railroads for the qualitative analysis under the final rule, FRA has therefore changed the second condition of the rate-based analysis to the 90th percentile of railroads in either of the two remaining factors. Preliminary analyses estimate FRA's approach will identify approximately 40-45 railroads over a five-year period,¹⁸ which is consistent with FRA's position in the NPRM that 43 potential railroads are a reasonable pool to examine further in the qualitative analysis.

AAR/ASLRRA commented that when FRA determines whether it should subject a railroad to a qualitative analysis, the two conditions should be causally-related, and not two completely unrelated measurements. Specifically, AAR/ASLRRA commented that

¹⁸ FRA's analysis estimated that approximately eight to nine railroads would be identified each year.

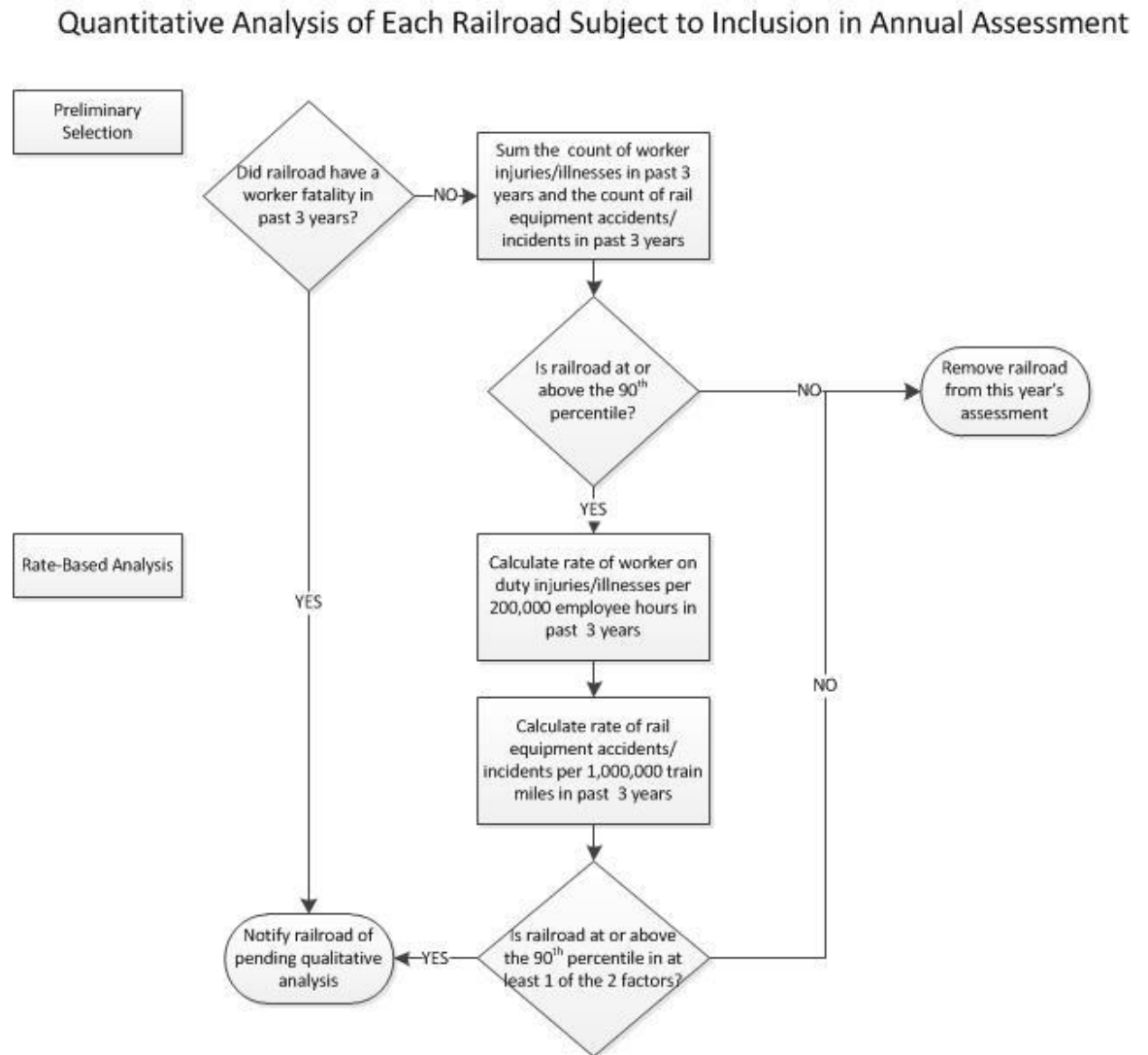
the conditions related to employee casualties and reportable accident/incident data should be related to railroad operations. Issues regarding causation, however, will be part of the qualitative analysis. FRA has therefore not made any changes in response to this comment.

An individual commented supporting a previous individual comment submitted in response to the ANPRM, asserting a “key metric for deciding if a non-Class I railroad has an ‘inadequate safety record’ ... should be whether it transports the most dangerous hazmat cargoes through urban areas or sensitive environmental areas.” The New Jersey Work Environment Council’s comment shared this concern.

FRA does not believe that simply transporting dangerous hazardous materials through urban or sensitive environmental areas is a valid metric for determining whether a railroad has inadequate safety performance. Such operations only indicate a railroad’s specific hazards and risks, and do not indicate whether a railroad is safely performing such operations. FRA’s quantitative analysis will identify such railroads, however, if they have a worker on-duty fatality or a high number and rate of FRA reportable accidents/incidents, FRA reportable illnesses/injuries, and FRA violations (as calculated by the rule’s methodology). Once the quantitative analysis identifies such a railroad, FRA can review factors such as the shipment of dangerous hazardous materials through urban or sensitive environmental areas as part of the qualitative analysis. For example, FRA has data regarding shippers of hazardous materials, commodity flows, and other GIS-related data that can be considered in the qualitative analysis. Additionally, the HHFT Final Rule establishes requirements regarding the routing of certain hazardous materials. FRA therefore concludes this final rule should not consider imposing an

additional regulatory requirement upon railroads simply based on whether a railroad transports dangerous hazardous materials through urban or sensitive environmental areas.

To summarize, the below flow chart illustrates how the quantitative analysis will identify railroads for the qualitative assessment.



Paragraph (c) describes FRA's qualitative assessment of railroads the quantitative analysis identifies as possibly having inadequate safety performance. FRA made several non-substantive changes in this paragraph to replace passive voice with active voice.

During the qualitative assessment, FRA will consider documentation from the railroad, comments from the railroad's employees, and any other pertinent information. This input will help FRA determine whether the quantitative analysis accurately identified a problem with the railroad's safety performance. Essentially, the qualitative assessment serves as a safety valve that helps FRA avoid determining a railroad demonstrates ISP merely because of one or more statistical outliers in FRA's data.

Paragraph (c)(1) states FRA will provide initial written notification to railroads identified in the threshold quantitative analysis as possibly having inadequate safety performance. Paragraph (c)(1)(i) further specifies that a notified railroad must inform its employees of FRA's notice within 15 days of receiving notification. A railroad must post this employee notification at all locations where a railroad reasonably expects its employees to report for work and have an opportunity to observe the notice. The railroad must continuously display the notice until 45 days following FRA's initial notice. A railroad must use other means to notify employees who do not have a regular on duty point to report for work, consistent with the railroad's standard practice for communicating with employees. Such a notification could take place by e-mail, for example. The notification must inform employees that they may submit confidential comments to FRA regarding the railroad's safety performance, and must contain instructions for doing so. Any such employee comments must be submitted within 45 days of FRA's initial notice. FRA changed this paragraph from the NPRM to add additional language specifying the railroad must also inform employees they must file any comments with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer, 1200 New Jersey Avenue, SE, Washington, DC 20590.

Likewise, paragraph (c)(1)(ii) provides railroads 45 days from FRA's initial notice to provide FRA documentation supporting any claim the railroad does not have inadequate safety performance. For example, if a fatality on railroad property was determined to be due to natural causes (such as cardiac arrest), or if an accident/incident was due to an act of God, the railroad's chief safety officer could provide a signed letter attesting to the facts and explaining why FRA should not find the railroad has inadequate safety performance. A railroad could also submit information regarding any extenuating circumstances of an incident or the severity of an injury (for example, a bee sting may not be as serious a safety concern as a broken bone, depending on the circumstances), or evidence that the railroad has already taken steps that effectively address a problem that led to the railroad being identified as possibly demonstrating inadequate safety performance. Further, although FRA has removed a railroad's FRA violation rate from the rated-based analysis, FRA may consider violations during the qualitative assessment (see below discussion of paragraph (c)(2)). FRA therefore still encourages a railroad to submit information regarding its FRA violations for consideration during the qualitative assessment. For example, FRA will consider explanations regarding FRA-issued violations and any mitigating action the railroad has taken to remedy the violations. FRA adopts this provision unchanged from the NPRM.

Paragraph (c)(2) describes the qualitative assessment of railroads the quantitative analysis identified. During the qualitative assessment, FRA will consider information a railroad or its employees provide under paragraph (c)(1) of this section and any other pertinent information. Even though FRA is removing a railroad's FRA violation rate from consideration in the quantitative analysis in response to concerns from AAR and

ASLRRA (as discussed above), FRA does not agree with AAR and ASLRRA's contention that violations are "meaningless" when determining whether a railroad has inadequate safety performance. For example, frequent or severe violations of safety regulations can be an important indicator of a railroad's overall safety culture. This could be especially true in situations where FRA has issued the violations only after other attempts to correct the railroad's repeated non-compliance (e.g., by issuing notices of defects or other written or verbal notices of non-compliance) have failed. Similarly, FRA also issues violations for one-time instances of non-compliance that are particularly egregious from a railroad safety perspective (e.g., interference with a grade crossing system that results in an activation failure). In determining whether a railroad demonstrates inadequate safety performance, FRA considers it essential to consider violations to the extent they indicate either a poor safety culture or a one-time instance of non-compliance that is egregious or critical to safety. FRA is therefore adding language to paragraph (c)(2) clarifying that FRA may consider violations during the qualitative assessment.

FRA may communicate with the railroad during the qualitative assessment to clarify its understanding of any information the railroad submitted. Based upon the qualitative assessment, FRA will make a final determination regarding whether a railroad has inadequate safety performance no later than 90 days following FRA's initial notice to the railroad. Except for the added language regarding violations, FRA adopts this provision unchanged from the NPRM.

Paragraph (d) states FRA will provide a final notification to each railroad given an initial notification under paragraph (c) of this section, informing the railroad whether

FRA has found it has inadequate safety performance. FRA has made a minor, non-substantive change to the NPRM's language to make the first sentence of this paragraph easier to read. Additionally, proposed paragraph (d) contained language addressing ISP railroad compliance, which FRA has moved to paragraph (e) of this section for organizational purposes. Consequently, there are non-substantive organizational changes to paragraph (e).

Paragraph (e)(1) contains language from proposed paragraph (d) of the NPRM, stating that an ISP railroad must develop and implement an RRP meeting the requirements of this rule and must submit an RRP plan meeting the filing and timing requirements of § 271.301. FRA has made minor changes to this language to streamline its content and avoid needlessly repeating the requirements of § 271.301. These changes do not affect the substance of the requirement.

Paragraph (e)(2) contains language from proposed paragraph (e) and states a railroad with inadequate safety performance must comply with the requirements of this rule for at least five years from the date FRA approves the railroad's RRP plan. FRA has made minor, non-substantive changes to streamline this language. As the NPRM explained, a five-year compliance period provides the minimum time necessary for an RRP to improve a railroad's safety performance. *See* 80 FR 10968 (Feb. 27, 2015). FRA expects a railroad with inadequate safety performance will take 36 months (3 years) following FRA plan approval to fully implement its RRP under § 271.225(a).¹⁹ FRA

¹⁹ FRA considered requiring a railroad with inadequate safety performance to comply with this rule for two years after submitting a notice to FRA demonstrating it had fully implemented its RRP. FRA concludes, however, that such a notice would impose an additional paperwork and cost burden on both the railroad and FRA. Rather, FRA believes most railroads will take three years to fully implement an RRP as § 271.225(a) allows.

does not expect an RRP, in itself, to improve a railroad's safety performance during this three-year implementation period, as a railroad will need this time to conduct a risk-based hazard analysis, prioritize risks, and develop mitigation strategies. A railroad will then begin applying mitigation strategies when it fully implements its RRP after three years. Once a railroad fully implements its RRP and begins applying mitigation strategies, the RRP will have at least two years to improve the railroad's safety performance by implementing mitigation measures and tracking their success. FRA bases this belief on an evaluation of an FRA Confidential Close Call Reporting System (C³RS) demonstration site showing that C³RS generated safety improvements two-and-a-half years after the railroad implemented the program.²⁰ See Ranney, J. and Raslear, T., "Derailments decrease at a C³RS site at midterm," FRA Research Results: RR12-04, April 2012, *available at* <http://www.fra.dot.gov/eLib/details/L03582>. The five-year compliance period therefore gives a railroad three years to fully implement its RRP and two years for a fully-implemented RRP to generate safety improvements. The two-year period after full implementation also provides FRA at least one opportunity to conduct an external audit of the railroad's fully-implemented RRP and to provide the railroad written results. FRA concludes, therefore, that the five-year compliance period is necessary to determine whether a railroad's fully-implemented RRP is generating safety improvements that are sustainable. FRA adopts this paragraph unchanged from the NPRM.

²⁰ Specifically, the evaluation found the following safety improvements at the C³RS demonstration site: (1) a 31-percent increase in the number of cars moved between incidents; (2) improved labor-management relations and employee engagement (i.e., an improved safety culture); and (3) a reduction in discipline cases. See Ranney, J. and Raslear, T., "Derailments decrease at a C³RS site at midterm," FRA Research Results: RR12-04, April 2012, *available at* <http://www.fra.dot.gov/eLib/details/L03582>.

FRA is adding language in paragraph (f) establishing an appeals process for railroads that FRA determines demonstrate inadequate safety performance.

AAR/ASLRRA commented urging FRA to establish an appeals process for railroads that the proposed methodology identifies as having inadequate safety performance.

AAR/ASLRRA noted that other FRA regulations include such a process (e.g., part 240—Qualification and Certification of Locomotive Engineers and part 242—Qualification and Certification of Conductors), and FRA has acknowledged such processes are fair and successful. AAR/ASLRRA specifically suggested that the process should “allow neutral persons to review and provide a determination, which would enhance objectivity.”

AAR/ASLRRA did not provide a specific suggestion indicating who should be the “neutral persons.”

FRA agrees including an appeals process for railroads determined to have inadequate safety performance would be fair. FRA therefore changed § 271.13 to add a process allowing railroads to petition the FRA Administrator for reconsideration of inadequate safety performance determinations under 49 CFR 211.7(b)(1), 211.56, and 211.59, which are procedures to appeal various FRA actions to the Administrator (e.g., Railroad Safety Board decisions regarding petitions for waiver of safety rules under 49 CFR part 211, subpart C). These procedures are well-established and should be familiar to the railroad industry.

Providing a direct appeal to the Administrator is appropriate because FRA will have already created a record of the inadequate safety performance determination as part of the quantitative and qualitative analysis. This record will also include comments and documentation railroads and railroad employees have submitted to FRA as part of the

qualitative assessment.²¹ After reviewing the record, the Administrator may either affirm, modify, or revoke the determination. Using existing procedures for appealing inadequate safety performance determinations reduces both uncertainty and unnecessary duplication.

Paragraph (f)(1) states that a railroad wishing to appeal a final written ISP determination must file a petition for reconsideration with the Administrator. Paragraph (f)(1)(A) states a railroad must file the petition no later than 30 days after the date the railroad receives FRA's final written notice under paragraph (d) of this section, and paragraph (f)(1)(B) states a railroad must comply with the procedures in §§ 211.7(b)(1) and 211.57. Paragraph (f)(2) states FRA will process petitions under § 211.59.

Because FRA is including an appeals process in paragraph (f) of the final rule, FRA has moved proposed paragraph (f) from the NPRM to paragraph (g) in this final rule. At the end of the five-year period, paragraph (g) provides that the railroad may petition FRA for approval to discontinue compliance with this rule, and FRA will process the petition using the procedures for waivers in 49 CFR 211.41. While the NPRM merely referenced the waiver provisions of part 211 in general, FRA is specifying § 211.41 in the final rule to clarify that the railroad must follow the procedures for waivers of safety rules (and not other petition processes in part 211, such as petitioning for a

²¹ Because AAR/ASLRRA's comment specifically referenced the appeals processes of parts 240 and 242 (which govern locomotive engineer and conductor certification), FRA notes that the record created during the inadequate safety performance analysis parallels the record created during an administrative hearing under §§ 240.409 and 242.509. FRA does not believe it is necessary to establish a board similar to the Operating Crew Review Board (OCRB) to review these determinations before an appeal to the Administrator, as the OCRB only reviews railroad certification decisions under parts 240 and 242 and does not act in a fact-finding capacity. Unlike with locomotive engineer and conductor certification proceedings, there will be no railroad determination in the RRP context for such a board to review. FRA also believes incorporating too many layers of appeal would unduly slow down the inadequate safety performance determination process.

rulemaking in § 211.11). Further, while the NPRM did not specify how FRA would process the petition, FRA also changed this language to clarify that FRA will process the petition under § 211.41. As a result, FRA also removed language in the NPRM stating that FRA will notify a railroad in writing whether or not the railroad must continue compliance with the rule. This language is unnecessary because § 211.41 contains provisions regarding what notification FRA must provide a railroad. Upon receiving a petition, FRA will evaluate the railroad's safety performance to determine whether the railroad's RRP has resulted in significant safety improvements, and whether these measured improvements are likely to be sustainable in the long term. FRA's evaluation will include a quantitative analysis as described in paragraph (b). FRA has added language to this paragraph clarifying that FRA will not automatically grant a petition to discontinue compliance if the quantitative analysis results do not meet the identification thresholds described for moving on to the qualitative analysis (although FRA would certainly consider such results). For all petitions, FRA will also examine qualitative factors and review information from FRA RRP audits and other relevant sources. This approach ensures that a railroad is not granted permission to discontinue compliance when its safety record has not substantively improved, but, rather, the rest of the railroad industry has become statistically less safe, thereby making the ISP railroad appear only comparatively safer. In such a scenario, FRA believes it will be appropriate to effectively increase the pool of ISP railroads by requiring continued compliance for ISP railroads that have not substantively improved their safety performance. While ASLRRRA commented in response to DOT's regulatory review initiative that there was no performance benchmark for removal from mandatory ISP compliance, FRA believes that

this approach—combining a new ISP analysis with an evaluation of whether the ISP railroad’s RRP has generated long-term, sustainable safety benefits—provides a sufficient benchmark for judging whether an ISP railroad must continue RRP compliance.

Analysis of the railroad’s safety performance to decide whether FRA should grant its petition will depend on the unique characteristics of the railroad and its RRP. Therefore, it is not possible to enumerate the types of data FRA will examine to evaluate a petition to discontinue compliance. In general, FRA will look at information it needs to determine whether there are real and lasting changes to the operational safety and organizational safety culture. The Safety Board will use staff recommendations and other information it deems necessary to make a final determination about whether granting a petition is in the interest of public safety. After completing the evaluation, FRA will notify the railroad in writing whether it will be required to continue compliance with this part. FRA will encourage a railroad to continue its RRP voluntarily even if FRA grants its petition to discontinue compliance with this part. If a railroad decides to continue its RRP after FRA grants its petition to discontinue compliance, FRA will consider the railroad a voluntarily-compliant railroad under § 271.15. This will continue application of § 271.11 to protect information the railroad continues to compile or collect under its voluntary RRP from discovery and admission as evidence in litigation. If a railroad decides not to continue with a voluntarily-compliant RRP meeting the requirements of this part, information it compiled or collected under the RRP will remain protected under § 271.11. However, § 271.11 will not protect any new information compiled or collected after the railroad discontinues its RRP.

Section 271.15 – Voluntary compliance

The RSIA provides that railroads not required to establish a railroad safety risk reduction program may nevertheless voluntarily submit for FRA approval a plan meeting the requirements of the statute. *See* 49 U.S.C. 20156(a)(4). Section 271.15(a) implements this language by permitting a railroad not otherwise subject to the rule to voluntarily comply by establishing and fully implementing an RRP that meets the requirements of the rule. While this paragraph in the NPRM said a voluntarily-compliant railroad “could be subject to civil penalties for failing to comply with the requirements of this part,” FRA is rephrasing this sentence and changing “could” to “is” in the final rule to make this language consistent with other provisions in FRA regulations discussing civil penalties (*See e.g.*, § 271.9 of this final rule). This change does not affect the substance of this paragraph. Because FRA otherwise adopts paragraph (a) unchanged from the NPRM, FRA is not repeating the NPRM’s section-by-section analysis here but refers interested readers to the NPRM’s discussion. *See* 80 FR 10969 (Feb. 27, 2015).

Paragraph (b) specifies that a voluntarily-compliant railroad must comply with this rule’s requirements for a minimum period of five years, running from the date on which FRA approves the railroad’s RRP plan. As with ISP railroads, the rule therefore provides a voluntarily-compliant railroad three years to fully implement an RRP under § 271.225(a) and two years following full implementation to realize RRP-related safety improvements. Further, as the NPRM and the above section-by-section analysis for § 271.13(e)(2) explain, a five-year period provides the minimum amount of time necessary for an RRP to have a substantive effect on a railroad’s safety performance. *See* 80 FR 10969 (Feb. 27, 2015).

AAR/ASLRRA and ASLRRA both commented that a five-year compliance period was unnecessary and that FRA should require railroads to voluntarily comply only for two years, asserting small railroads can make changes quickly and efficiently. As explained above, a minimum five-year compliance period appropriately provides a voluntarily-compliant railroad three years to fully implement its RRP and two years following full implementation to realize safety improvements. Further, because there is a wide range of size among Class II and Class III railroads, FRA does not believe all voluntarily compliant railroads will be able to establish an RRP and achieve safety improvements in two years.²²

An RRP is also an ongoing commitment to safety, not a program a railroad temporarily implements to address a specific problem and then abandons once the problem is fixed. Such an approach would make RRP another reactive program, instead of a proactive approach to improving railroad safety. Moreover, a railroad that volunteers to comply with the RRP rule, knowing such compliance must last five years, is making an important demonstration of that safety commitment. If a voluntarily-compliant railroad concludes that an RRP has either achieved the railroad's safety goals or is not producing safety benefits before the end of the five-year compliance period, the railroad could petition FRA for a waiver from this rule's requirements under part 211, subpart C's procedures for requesting waivers of safety rules.

The five-year compliance period also helps prevent situations in which a railroad will voluntarily comply for a few months or years only to selectively take advantage of

²² FRA also notes that the STB classifies railroads based on revenue, not system size or complexity. *See* 49 CFR 1201.1-1. Further, revenue alone may not be an adequate indicator of how quickly a railroad could implement an RRP.

this rule's information protections, abandoning the program once the railroad has achieved its information protection goals. If a railroad wishes to have this rule's information protection benefits, the railroad should earnestly commit to complying for a minimum of five years, which gives the railroad three years to fully implement its RRP and two years to realize safety improvements following full implementation.

Finally, FRA will expend agency time and resources in approving a voluntarily-compliant railroad's RRP plan and auditing the railroad's RRP. In return, FRA expects a voluntarily-compliant railroad to commit to complying with this rule for five years. Otherwise, FRA could expend agency resources for limited or even non-existent safety benefits.

Conversely, Labor Organizations I argued that FRA should require voluntarily-compliant railroads to comply with the rule permanently. A permanent compliance approach, however, could disincentivize voluntary compliance to the extent that no (or very few) railroads would ever volunteer. FRA therefore declines to require permanent, voluntary compliance.

The NPRM also requested public comment on whether FRA should allow railroads to voluntarily comply with an SSP final rule instead of an RRP final rule. No commenters responded to FRA's questions, and FRA is not including a voluntary SSP compliance provision in this final rule. FRA concludes that any such provision would properly belong in the SSP rule, not the RRP rule.

Paragraph (c) in the NPRM proposed that a voluntarily-compliant railroad could petition FRA to discontinue compliance with the rule after the minimum five-year compliance period. ASLRRA commented that the requirement to comply should

terminate automatically, unless FRA determines otherwise. After reassessing proposed paragraph (c), FRA is concerned that the proposed approach would disincentivize voluntary compliance by making it more difficult for a voluntarily-compliant railroad to leave the program once it joins. Paragraph (c) of the final rule therefore provides that a voluntarily-compliant railroad may discontinue mandatory compliance with this rule after the five-year period by providing written notice to the FRA Associate Administrator for Railroad Safety and Chief Safety Officer. This approach will not negatively impact safety, because FRA will add the former voluntarily-compliant railroad to the pool of railroads FRA annually analyzes for inadequate safety performance. Some inefficiencies may occur if a former voluntarily-compliant railroad dismantles its RRP, but then must recreate the program if FRA determines that the railroad demonstrates inadequate safety performance. However, this scenario is unlikely for several reasons. First, the rule's information protections will be an incentive for a railroad to continue compliance, as the protections will not apply to information that a railroad compiles or collects for non-RRP purposes. This incentive will lower the number of voluntarily-compliant railroads that decide to discontinue mandatory compliance. Second, a voluntarily-compliant railroad will not discontinue compliance if it reasonably believes FRA will thereafter determine that the railroad demonstrates inadequate safety performance because, if FRA then found the railroad had inadequate safety performance, the railroad could discontinue compliance only if FRA granted its petition to discontinue under § 271.13(g). Finally, FRA believes many voluntarily-compliant railroads will comply indefinitely with the RRP rule because they will realize the safety benefits an RRP generates. Once a

voluntarily-compliant railroad implements an RRP and begins to realize its safety benefits, it is unlikely the railroad would dismantle its program.

Paragraph (d) provides that the information protection provisions of § 271.11 apply to information a voluntarily-compliant railroad compiles or collects under a voluntarily-compliant RRP meeting the requirements of this rule. As discussed in the section-by-section analysis for § 271.11, voluntary risk reduction programs (for example, programs generated as part of a Short Line Safety Institute) must fully comply with this rule for the information generated to be protected from discovery and use as evidence in litigation. FRA changed this provision from the NPRM to include a reference to § 271.301(b)(4)(ii), discussed further below, which provides that the § 271.11 information protections will apply to a voluntarily-compliant railroad starting on the day the railroad notifies FRA it intends to file an RRP plan for review and approval. FRA also modified this provision by removing the word “only,” which could have implied that § 271.11 applied only to voluntarily-compliant railroads.

ASLRRA generally commented that “FRA has proposed requirements designed to limit the number of railroads that comply voluntarily. The ASLRRA submits that any requirement to limit the number of small railroads that comply voluntarily is antithetical to the letter and spirit of the RSIA.” ASLRRA’s comment is unclear to FRA, as FRA does not believe § 271.15 establishes requirements to limit the number of railroads that comply voluntarily. To the extent ASLRRA’s comment means the five-year compliance period would disincentivize voluntary participation, FRA refers to the above discussion of why FRA believes this compliance period is necessary. FRA also believes that this

rule's information protections provide a reasonable incentive for voluntarily-compliant railroads, even with the five-year compliance period.

Subpart B—Risk Reduction Program Requirements

Subpart B contains the basic RRP elements the rule requires. The rule provides a railroad significant flexibility in developing and implementing an RRP.

Section 271.101 – Risk reduction programs

Section 271.101 contains general RRP requirements. Paragraph (a) requires railroads to establish and fully implement an RRP meeting the requirements of this rule. Except for the minor changes discussed below, FRA adopts paragraph (a) unchanged from the NPRM. FRA therefore refers interested readers to the NPRM's discussion. *See* 80 FR 10969 (Feb. 27, 2015).

As proposed in the NPRM, the third sentence of paragraph (a) stated, "An RRP is not a one-time exercise, but an ongoing program that supports continuous safety improvement." FRA has removed the phrase "not a one-time exercise, but" in the final rule, so the sentence now reads, "An RRP is an ongoing program that supports continuous safety improvement." This change does not affect the substantive meaning of the sentence (which is to indicate the ongoing nature of an RRP) and was made solely to streamline the regulatory language.

FRA also changed paragraph (a) to include a sentence clarifying that a railroad must design its RRP to promote and support a positive safety culture at the railroad. Although the NPRM did not propose this specific language, FRA believes promoting a positive safety culture is intrinsic to SMS programs like RRP, and improving a railroad's safety culture was extensively discussed in the NPRM. *See id.* at 10952, 10953, 10968,

10971, and 10973. A railroad must also identify and analyze its safety culture under § 271.105(a), describe its safety philosophy and safety culture under § 271.203(b)(1), and describe how it promotes improvements to its safety culture under § 271.203(b)(2). The added language reflects that an important component of an RRP is an improved safety culture. Further, the SSP NPRM proposed identical language, which is included in the SSP rule, and FRA is including this language in paragraph (a) to promote consistency between the two rules. *See* 77 FR 55403 (Sept. 7, 2012) and 81 FR 53878, 53897 (Aug. 12, 2016). FRA inadvertently omitted including this language in the RRP NPRM.

Paragraphs (a)(1) through (5) list necessary components that an RRP must contain, including: (1) a risk-based hazard management program (described in § 271.103); (2) a safety performance evaluation component (described in § 271.105); (3) a safety outreach component (described in § 271.107); (4) a technology analysis and technology implementation plan (described in § 271.109); and (5) RRP implementation and support training (described in § 271.111). FRA adopts these paragraphs unchanged from the NPRM.

Paragraph (a)(6) references a component the NPRM did not specifically include: involvement of railroad employees in the establishment and implementation of an RRP under § 271.113. The section-by-section analysis for § 271.113 discusses the substance of this additional component in detail.

Paragraph (b) requires a railroad to support its RRP with an FRA-approved RRP plan meeting subpart C requirements. FRA adopts paragraph (b) unchanged from the NPRM.

Proposed paragraph (c) of the NPRM addressed railroads subject to the RRP rule that host passenger train service for passenger railroads subject to the requirements of the SSP rule. Under § 270.103(a)(2) of the SSP rule, a passenger railroad must communicate with each host railroad to coordinate the portions of its SSP plan applicable to the host railroad. *See* 81 FR 53897 (Aug. 12, 2016). Paragraph (c) of the NPRM proposed requiring a host railroad, as part of its RRP, to participate in this communication and coordination with the passenger railroad.

APTA commented that proposed paragraph (c) “aspires to communication and cooperation, but provides no framework for accomplishing either and no standard by which to measure either.” FRA does not agree that this provision requires additional framework or standards. Because no two arrangements between a passenger railroad and a host railroad will be the same, a passenger railroad and host railroad should have the flexibility to communicate and cooperate in the manner best suited to their particular operations. However, FRA made minor changes to proposed paragraph (c) for clarity. FRA also designated proposed paragraph (c) as paragraph (c)(1). FRA does not intend these changes to affect the substance of the provision.

In response to DOT’s regulatory review initiative, VRE commented expressing concern that it may be subject to enforcement action if, despite attempting in good faith to communicate with its host railroads (which include CSX Transportation, Norfolk Southern Corporation, and Amtrak) as the SSP rule requires, its host railroads did not cooperate in producing data or other information necessary for VRE’s SSP. *See* DOT-OST-2017-0069-2405. Paragraph (c) addresses VRE’s concern, as it specifically requires an RRP railroad to communicate and coordinate with a tenant SSP railroad as required by

the SSP final rule. A host RRP railroad that does not participate in this communication and coordination could then be subject to FRA enforcement action under the RRP final rule.

FRA also added a paragraph (c)(2) to the final rule, requiring a host railroad to incorporate its communication and coordination with the SSP railroad into its own RRP. This language ensures a railroad's SSP communication is not completely isolated from the railroad's own RRP. Because RRP and SSP are systemic programs intended to promote analysis and proactive mitigation measures, communication and coordination between a railroad's RRP and SSP activities will improve railroad safety.

In paragraph (d) of the NPRM, FRA proposed requiring a railroad to ensure persons utilizing or performing a significant safety-related service on its behalf support and participate in the railroad's RRP. The NPRM identified such persons as host railroads, contract operators, shared track/corridor operators, or other contractors. AAR/ASLRRA commented that the term "utilize" could mean anyone interested in railroad safety, including passengers and the general public. Although AAR/ASLRRA indicated they were not concerned with the substance of the provision, they recommended that FRA remove the term "utilize."

FRA agrees with AAR/ASLRRA that paragraph (d) should not be interpreted to require a railroad to ensure passengers or the general public support and participate in the railroad's RRP as persons "utilizing" significant safety-related services. FRA's intent was to address persons who utilize a railroad's significant safety-related services on a routine or systemic basis to conduct railroad operations, such as a passenger railroad that operates over an RRP railroad's track and utilizes its dispatching service. FRA has,

therefore, changed the language of this provision to clarify its requirements and reflect FRA's original intent. Paragraph (d) of the final rule first references § 271.205(a)(3), which requires a railroad's RRP plan to identify persons that enter into a contractual relationship with the railroad to either perform significant safety-related services on the railroad's behalf or to utilize significant safety-related services the railroad provides for railroad operations purposes. The changed language then clarifies the term "utilize" in two ways.

First, the relationship between the railroad and the person utilizing its significant safety-related services must be contractual. This language ensures there is a formalized agreement between the railroad and the person regarding the significant safety-related service. With the formalized agreement, the duties of the contractor will be clear and, therefore, the extent to which they are performing or utilizing significant safety-related services of the railroad will be clear as well. This language clarifies that this section does not require a railroad to ensure the general public (or any other entity with only an interest in the safe operation of a railroad as a matter of due course (for example, schools or residents located near an RRP railroad's track)) supports and participates in the railroad's RRP.

Second, the final rule's language clarifies that the person must be utilizing the railroad's significant safety-related services to conduct railroad operations. For example, if a railroad contracts with a company to perform bridge maintenance, that company provides a significant safety-related service to the railroad on behalf of the railroad. If during the bridge maintenance the company uses the railroad's roadway worker protection, that company is then also utilizing a significant safety-related service

(roadway worker protection) provided by the railroad. A railroad does not have to identify persons providing or utilizing significant safety-related services for purposes unrelated to railroad operations, such as railroad passengers or motor vehicle drivers who benefit from a highway-rail grade crossing warning system. The SSP final rule contains similar language in § 270.103(d)(2). *See* 81 FR 53897 (Aug. 12, 2016).

FRA also added language clarifying that a railroad must identify such a person even if the person is not otherwise required to comply with this rule (for example, a tourist railroad that operates over an RRP railroad's track). The final sentence of paragraph (d) is also essentially the same as the NPRM, and requires a railroad to ensure the identified persons support and participate in the railroad's RRP.

Section 271.103 – Risk-based hazard management program

Except for changing a reference to § 271.301(b) in the proposed rule to § 271.301(d) to account for organizational changes in § 271.301, FRA adopts this section, which contains the requirements for each risk-based hazard management program (HMP), unchanged from the NPRM. FRA is therefore not repeating the NPRM's section-by-section analysis in this final rule, but refers interested readers to the NPRM's discussion. *See* 80 FR 10970-10971 (Feb. 27, 2015). FRA is, however, discussing comments it received in response to the proposed requirements of this section, although FRA is not making changes in response.

AAR/ASLRRA commented on proposed paragraph (b). As proposed under paragraph (b), a railroad must conduct a risk-based hazard analysis as part of its risk-based HMP and specified that, at a minimum, a risk-based hazard analysis must address the following components of a railroad's system: infrastructure; equipment; employee

levels and work schedules; operating rules and practices; management structure; employee training; and other areas impacting railroad safety that are not covered by railroad safety laws or regulations or other Federal laws or regulations. AAR/ASLRRA commented that FRA should omit the reference to employee levels and work schedules because FRA carved fatigue management plans out for treatment in the separate FMP rulemaking. Thus, they conclude this language is not appropriate and should be removed.

FRA disagrees with AAR/ASLRRA because the language “employee levels and work schedules” may encompass issues unrelated to fatigue the FMP rulemaking will not address. For example, whether a railroad has a sufficient number of track inspectors for a certain territory may involve a question of employee levels, but not necessarily fatigue.

As proposed under paragraph (c) of the NPRM, a railroad must design and implement mitigation strategies that improve safety as part of its risk-based HMP, although the NPRM also clarified it was not defining a level or risk that railroad’s risk-based HMP must target. *See* 80 FR 10971 (Feb. 27, 2015). FRA observed, however, that FRA’s Passenger Equipment Safety Standards require passenger railroads, when procuring new passenger cars and locomotives, to ensure fire considerations and features in the equipment design reduce the risk of personal injury caused by fire to an acceptable level using a formal safety methodology such as MIL-STD-882. *See* 80 FR 10971 (Feb. 27, 2015) (*citing* 49 CFR 238.103(c)). FRA also noted passenger railroads operating Tier II passenger equipment must eliminate or reduce risks posed by identified hazards to an acceptable level. *See Id.* (*citing* 49 CFR 238.603(a)(3)). FRA specifically requested comment on whether a final RRP rule should define levels of risks a railroad’s risk-based HMP must target. *Id.*

Only AAR/ASLRRA commented in response, urging FRA not to define levels of risk railroads should target.²³ In support, AAR/ASLRRA distinguished the two part 238 provisions FRA cited from the proposed RRP rule, observing that the part 238 provisions involve risks associated with equipment design or operation, not risks associated with an entire railroad system. AAR/ASLRRA therefore observed it is not clear how the level of railroad-wide risk could be determined, given the number of component hazards and risks involved. AAR/ASLRRA also noted the cited part 238 provisions require reduction of risk to an acceptable level and refer to the methodology in MIL-STD-882, which requires reduction of risk to the lowest acceptable level within the constraints of cost, schedule, and performance, arguing these provisions themselves do not define acceptable or unacceptable levels of risk, but rather exhort actors to reduce risk to the lowest acceptable level, all things considered. AAR/ASLRRA assert that any additional requirement defining risk levels or resembling MIL-STD-882 would only add process, not substance. Having considered these comments, FRA clarifies that neither § 271.103 nor any other section in this final rule defines a level of risk a railroad should target.

An individual also commented generally that an RRP final rule should require fitness-for-duty standards and railroads must do more to monitor and prevent human performance lapses leading to train collisions and derailments. The individual suggested that instead of using inward-facing cameras to monitor and enforce rules, railroads should utilize inward-facing cameras with facial monitoring software to apply train brakes when operating personnel are falling asleep or otherwise inattentive. FRA declines to

²³ AAR/ASLRRA's comment indicated that they were responding to proposed § 271.103(e). Because the NPRM did not contain a § 271.103(e), however, FRA assumes that AAR/ASLRRA's comment was in response to proposed paragraph (c) and FRA's solicitation of public comment.

incorporate these suggestions because they address specific mitigations measures for specific railroad safety risks, and therefore are inappropriate for the process-oriented, performance-based nature of this final rule.

Section 271.105 – Safety performance evaluation

This section contains requirements for safety performance evaluations. Safety performance evaluation is a necessary part of a railroad's RRP because it determines whether the RRP is effectively reducing risk. It also monitors the railroad's system to identify emerging or new risks. The following are examples of changes to a railroad's system that may constitute a new or emerging risk: (1) a change in operating rules; (2) implementation of new technology, or (3) a reduction in crew staffing levels. Safety performance evaluation is essential for ensuring that a railroad's RRP is an ongoing process, and not merely a one-time exercise.

Except for paragraph (a) and a minor editorial change in paragraph (c), discussed below, FRA adopts this section unchanged from the NPRM. FRA is therefore not repeating the NPRM's section-by-section analysis in this final rule and refers interested readers to the NPRM's discussion. *See* 80 FR 10971 (Feb. 27, 2015). FRA also discusses comments it received in response to proposed paragraph (b)(5), but makes no changes based on those comments.

In addition to requiring a railroad to develop and maintain ongoing processes and systems for evaluating the safety performance of the railroad's system, paragraph (a) in the NPRM proposed requiring a railroad to develop and maintain processes and systems for measuring its safety culture. AAR/ASLRRA commented in response that section 20156 does not require a railroad to measure its safety culture as FRA proposed in this

section and in § 271.213, discussed below. They argued the RSIA did not require a railroad to measure safety culture because it is hard to do so effectively and reliably, and culture can be described and evaluated, but not be meaningfully quantified. According to AAR/ASLRRA, each railroad is different, and their cultures and the ways those cultures present in the workplace are different. Further, as an RRP matures, they argued the approach each railroad takes to assessing its safety culture may change. AAR/ASLRRA specifically suggested that FRA should leave to each railroad the decisions regarding how to evaluate, assess, and support its safety culture without prescribing generation of measurement data.

Contrary to AAR/ASLRRA's comment, FRA did not intend proposed paragraph (a) to require a specific data-driven and quantifiable measurement of a railroad's safety culture. As the NPRM explained, a railroad could measure its safety culture by surveying employees and management to establish an initial baseline safety culture, and then comparing the initial baseline to subsequent surveys. *See* 80 FR 10971 (Feb. 27, 2015). The NPRM further clarified FRA would give a railroad substantial flexibility to decide which safety culture measurement best fit the organization – for example, a survey or other instrument that has been validated and proven to correlate with safety outcomes (i.e., the survey or other instrument has been studied to determine whether it reliably and repeatedly measures what it intends to measure). FRA's primary concern would be to ensure the selected measurement provided a way to demonstrate that an improvement in the safety culture would reliably lead to a corresponding improvement in safety. *Id.* This approach gives a railroad sufficient flexibility to measure its safety culture in a manner that works best for the railroad, as AAR/ASLRRA urge.

In response to AAR/ASLRRA's comment, instead of the term "measuring," this section of the final rule uses the phrase "identifying and analyzing," which comes directly from section 20156(c) of the statutory mandate. A railroad will still have the flexibility to decide how to identify and analyze its safety culture if the tools the railroad uses provide a way to connect improvements in safety culture to corresponding improvement in safety.

Labor Organizations I also commented on how a railroad could measure safety culture. Referencing the FAA and "Weick and Sutcliffe," Labor Organizations I noted that traits of a health safety culture can be identified within High Reliability Organizations. Labor Organizations I urged FRA to establish criteria mandating that railroad RRP's adhere to standards proven in other industries where the principles of safety are the same despite operational or other differences.

FRA is not adopting specific standards regarding how a railroad must identify and analyze its railroad safety culture. Although various such standards exist, FRA is unaware of a universal standard for safety culture this final rule could adopt. Further, the final rule contains a DOT-wide definition of safety culture, discussed in the section-by-section analysis for § 270.5, which provides substance for the meaning of safety culture. Even if there was a universal safety culture standard fitting every railroad that FRA could mandate, doing so would codify today's safety culture standards into the rule, requiring an amendment process every time such standards advanced or progressed. FRA anticipates the understanding of safety culture will change as time progresses and does not want to restrict railroads to using today's standards for tomorrow's analysis. FRA is therefore declining to mandate specific safety culture standards in the final rule, but is

instead implementing an approach where a railroad must describe in its RRP plan how it will identify and analyze its safety culture, noted above.

Paragraph (b)(5) in the NPRM proposed that one of the sources a railroad must establish to monitor safety performance is a reporting system through which employees can report safety concerns (including, but not limited to, hazards, issues, occurrences, and incidents) and propose safety solutions and improvements. The NPRM explained this would not require a railroad to establish an extensive program like FRA's C³RS, although FRA specifically requested public comment elsewhere in the NPRM on the extent to which programs like C³RS might be useful to develop an RRP or as a component of an RRP. *See* 80 FR 10954 and 10971 (Feb. 27, 2015). Labor Organizations I commented in response that the confidentiality component of C³RS programs may make them difficult to contain within the confines of an RRP. Specifically, Labor Organizations I urged separation between RRP and C³RS because they believe C³RS confidentiality is incompatible with the level of description necessary to conform to this paragraph's requirements. Labor Organizations I also specifically commented that C³RS programs should not simply be re-branded to comply with the RRP requirements.

FRA both disagrees and agrees with Labor Organization I's comment. FRA disagrees with Labor Organization I because a railroad could incorporate a C³RS program into its RRP. FRA also disagrees with Labor Organizations I that the confidentiality associated with C³RS programs may not be compatible with the description needed for this requirement. Even though C³RS reports are de-identified to remove information that may identify the reporter or other employees involved, sufficient information will likely still be included to allow a railroad to analyze the general risks and hazards presented by

the report. Further, if a railroad wanted to obtain more information, it could establish a second reporting system to supplement C³RS for employees who are not concerned about maintaining confidentiality. FRA agrees with Labor Organizations I, however, that a railroad cannot comply with an RRP final rule simply by re-branding a C³RS program as an RRP. While C³RS can be part of an RRP, a railroad must go further to meet the requirements of this final rule.

An individual also commented generally that FRA should require all railroads to implement a C³RS program as part of their RRP. FRA is not implementing this suggestion because it is not in the voluntary spirit of the C³RS program. An effective C³RS depends on the trust and voluntary participation of all parties—qualities that would lose their meaning if FRA mandated C³RS for all RRP railroads.

The final change FRA made to this section is replacing the phrase “For the purpose of assessing” with the phrase “To assess” in paragraph (c). FRA made this change to streamline paragraph (c) and does not intend to affect its meaning.

Section 271.107 – Safety outreach

FRA adopts this section, with requirements on the safety outreach component of an RRP, unchanged from the NPRM. FRA is therefore not repeating the NPRM’s section-by-section analysis in this final rule, but refers interested readers to the NPRM’s discussion. *See* 80 FR 10971-10972 (Feb. 27, 2015).

Section 271.109 – Technology analysis and technology implementation plan

This section implements the RSIA requirement that an RRP include a technology analysis and a technology implementation plan. *See* 49 U.S.C. 20156(e). Except for a PTC deadline revision discussed below and changing an incorrect reference in the

proposed rule from § 271.13(e) to § 271.13(d), FRA adopts this section unchanged from the NPRM, but is addressing comments received in response to this section in the NPRM. FRA is therefore not repeating the NPRM's section-by-section analysis in this final rule but refers interested readers to the NPRM's discussion. *See* 80 FR 10972 (Feb. 27, 2015).

Paragraph (b) in the NPRM proposed requiring a railroad to conduct a technology analysis evaluating current, new, or novel technologies that may mitigate or eliminate hazards and the resulting risks identified through the risk-based hazard management program. At a minimum, proposed paragraph (b) stated a technology analysis must consider processor-based technologies, PTC systems, electronically-controlled pneumatic (ECP) brakes, rail integrity inspection systems, rail integrity warning systems, switch position monitors and indicators, trespasser prevention technology, and highway-rail grade crossing warning and protection technology.

AAR/ASLRRA commented in response that FRA should not require a railroad to address PTC systems and ECP brakes, asserting that other rulemakings performed a cost/benefit analysis for PTC and ECP brakes. AAR/ASLRRA argued that requiring railroads to perform the same analyses again as part of complying with the rule would be meaningless and inappropriate.

Because the RSIA mandates this requirement, FRA is promulgating paragraph (b) unchanged. In addition, this section requires a railroad to only evaluate the safety impact, feasibility, and costs and benefits of PTC systems and ECP brakes, and does not necessarily require implementation. This analysis will differ from railroad to railroad,

and therefore is not directly comparable to FRA's cost/benefit analysis in other rulemakings.

Paragraph (d) provides that, except as required by 49 CFR part 236, subpart I (Positive Train Control Systems), if a railroad decides to implement a PTC system as part of its technology implementation plan, the railroad shall set forth and comply with a schedule for implementation of the PTC system consistent with the deadlines in the Positive Train Control Enforcement and Implementation Act of 2015 (PTCEI Act), Pub. L. 114-73, 129 Stat. 576-82 (Oct. 29, 2015), and 49 CFR 236.1005(b)(7). The NPRM proposed that the railroad would have to implement the PTC system by December 31, 2018, which was consistent with 49 U.S.C. 20156(e)(4)(B). However, Congress subsequently passed the PTCEI Act, and FRA has changed paragraph (d) to reflect the changes to PTC implementation deadlines set forth in the Act. This paragraph does not, in itself, require a railroad to implement a PTC system. In the NPRM, FRA sought comment on whether a railroad electing to implement a PTC system would find it difficult to meet the December 31, 2018 implementation deadline. If so, FRA invited comment as to what measures could be taken to assist a railroad struggling to meet the deadline and achieve the safety purposes of the statute. FRA received two comments in response to this request. AAR/ASLRRA commented that the 2018 deadline is unrealistic even for the Class I railroads. Labor Organizations I and an individual commented that FRA should not extend the 2018 deadline.²⁴

²⁴ Labor Organizations I identified a December 31, 2015 PTC deadline. As both the NPRM and section 20156(e)(4)(B) state that the deadline is December 31, 2018, FRA assumes that Labor Organizations I intended to reference the 2018 deadline, and that reference to a 2015 deadline was an unintended mistake.

FRA recognizes the challenges associated with implementing a PTC system; however, FRA also recognizes that PTC is a technology that a railroad may seek to implement to eliminate or mitigate hazards and the resulting risks. Therefore, the regulation provides railroads the flexibility to decide whether they want to implement a PTC system as part of their technology analysis and implementation plan; if they do so, they must comply with an implementation schedule consistent with the deadlines in the PTCEI Act. The SSP final rule establishes the same deadline in § 270.103(r)(5). *See* 81 FR 53877 (Aug. 12, 2016).

Section 271.111 – Implementation and support training

This section requires a railroad to provide RRP training to each employee who has significant responsibility for implementing and supporting the railroad's RRP. Except for changes made to clarify paragraphs (a) and (b) discussed below, FRA adopts this section unchanged from the NPRM but is addressing comments received in response to this section in the NPRM. FRA is therefore not repeating the NPRM's section-by-section analysis in this final rule but refers interested readers to the NPRM's discussion. *See* 80 FR 10972-10973 (Feb. 27, 2015).

Proposed paragraph (a) specified the employees a railroad must train includes an employee of any person a railroad's RRP plan identified under § 271.205(a)(3) when that employee has significant responsibility for implementing and supporting the railroad's RRP. *See* 80 FR 10972 (Feb. 27, 2015). For reasons explained in the section-by-section analysis for § 271.101(d) above, FRA changed this provision to clarify which employees a railroad must identify under § 271.205(a)(3). FRA does not intend these changes to affect the substance of the proposed rule.

Proposed paragraph (b) specified a railroad must keep a record of training conducted under this section and update that record as necessary. FRA has included language in this paragraph of the final rule clarifying a railroad must make these records available for inspection and copying upon request to FRA or State railroad safety inspectors.

AAR/ASLRRA commented the proposed training requirement is an unnecessary and inappropriate overreach that belies the performance-based approach to rulemaking FRA claims the proposed rule effects. AAR/ASLRRA agreed with FRA's statement in the NPRM that the training requirement would apply to personnel not involved in operational duties and not directing or supervising those who do have such duties. However, AAR/ASLRRA asserted it would require a railroad to train employees including the chief safety officer of the railroad, and his or her direct reports and requiring employees at that level to submit to training implies they do not know or care how to do their jobs. AAR/ASLRRA suggest that if railroads determine effective implementation of their RRP would be aided by training certain employees, the content and timing of such training is a matter appropriately left to the railroads.

Conversely, Labor Organizations I commented the NPRM proposed highly limited requirements for railroads to train their employees to understand and participate in the RRP process. They argue there needs to be continued vigilant attention to risk reduction throughout the workforce to ensure there is full understanding of the dynamics of the issues in the workplace. Labor Organizations I suggested FRA should consider broadening the scope of the proposed training.

FRA is implementing the proposed training requirement in this final rule substantively unchanged, without adding additional requirements. FRA disagrees with AAR/ASLRRA that this training is unnecessary, as railroad employees, including high-level employees, may not know how to implement an RRP that complies with the specific requirements of this final rule, even if the employees are otherwise familiar with safety risk reduction programs. FRA also disagrees with Labor Organizations I that the final rule should expand the scope of the training.

Section 271.113 – Involvement of railroad employees

This section requires a railroad's RRP to involve the railroad's directly affected employees in the establishment and implementation of an RRP.

Paragraph (b) explains how a railroad should involve its directly affected employees, clarifying that a railroad must have a process for involving railroad employees when identifying hazards, developing and implementing mitigation strategies, conducting internal annual assessments, or otherwise performing actions required by this part. A railroad could involve its directly affected employees by including appropriate labor representatives or other employees on hazard management teams and by employee involvement in conducting RRP outreach.

While the NPRM did not specifically propose this component, employee involvement is an important component of a successful RRP. As the NPRM stated, an RRP encourages a railroad and its employees to work together to proactively identify hazards and to jointly determine what action to take to mitigate or eliminate the associated risks. *See* 80 FR 10950 (Feb. 27, 2015). While the NPRM contained provisions addressing railroad-employee consultation on the contents of a railroad's RRP

plan, it did not specify that a railroad must involve its directly affected employees in subsequent implementation of its RRP plan. Nonetheless, FRA did not intend that a railroad could comply with the RRP plan consultation process requirements in § 271.207 and then not involve its directly affected employees in any aspect of its RRP once FRA approves the plan. FRA does not believe that is consistent either with the collaborative and proactive nature of risk reduction or Congress' intent in requiring railroads to consult with directly affected employees on the contents of the railroad's RRP plan. FRA is therefore expressly including this section in the final rule. FRA is characterizing this requirement as employee "involvement" instead of "consultation" to avoid confusion between this section and the requirements for RRP plan consultation in § 271.207. These are distinct concepts because this section's involvement requirement will last through the duration of the railroad's RRP, while the § 271.207 plan consultation process requirement is satisfied when a railroad uses good faith and best efforts to consult with its directly affected employees on its RRP plan and when FRA approves the railroad's submitted plan.

FRA further believes this involvement requirement will improve employee engagement in the railroad's RRP, thereby improving employee performance, safety culture, and railroad safety. *See generally* Wojick, Tom, Case: Engagement, Safety & Quality in Chemical Manufacturing, Oct. 29, 2013, *available at* <http://www.6seconds.org/2013/10/29/case-engagement-safety-quality/>. Additionally, this requirement will lead to improvements in employee psychology and behavior, which are important components of safety culture. *See generally* Arendt, Don, Federal Aviation Administration, A Model of Organizational Culture, Dec. 2008, *available at*

http://www.faa.gov/about/initiatives/sms/reference_library/links/media/organizational_culture_model.pdf.

Subpart C—Risk Reduction Program Plan Requirements

Subpart C contains requirements for RRP plans.

Section 271.201 – General

This section requires a railroad to adopt and implement its RRP through a written RRP plan FRA has reviewed and approved under the requirements of subpart D. Because FRA adopts this provision unchanged from the NPRM, FRA is not repeating the NPRM's section-by-section analysis here but refers interested readers to the NPRM's discussion. *See* 80 FR 10973 (Feb. 27, 2015).

Section 271.203 – Policy, purpose and scope, and goals

This section contains requirements for policy, purpose and scope, and goals statements for an RRP plan. Except for moving a provision the NPRM proposed in paragraph (b)(4) to § 271.205(a)(4), as discussed below, this section remains unchanged. FRA is therefore not repeating the NPRM's section-by-section analysis here but refers interested readers to the NPRM's discussion. *See* 80 FR 10973-10974 (Feb. 25, 2017). FRA is otherwise addressing a comment received in response to this section in the NPRM, but is making no changes in response.

Paragraph (a) in the NPRM proposed requiring an RRP plan to include a policy statement endorsing the railroad's RRP signed by the chief official of the railroad (e.g., Chief Executive Officer). AAR/ASLRRA commented FRA should require the railroad's Chief Safety Officer to sign the policy statement, as the RRP Working Group had proposed. AAR/ASLRRA further argued the proposed requirement also departs from

section 20156(b), which specifies the chief official responsible for safety shall certify the contents of the program are accurate and the railroad will implement the contents of the plan. AAR/ASLRRA also asserted the chief official for safety will be more familiar with the details of the RRP than the chief official of the railroad and therefore is the more appropriate person to sign the policy statement.

FRA has not departed from the RSIA requirements because § 271.301(c)(1) of the final rule requires the railroad's chief official for safety to sign the RRP plan and certify the contents of the RRP plan are accurate and the railroad will implement the contents of the plan. This substantively mirrors the language in section 20156(b). Paragraph (a) of this section, however, requires the chief official at the railroad to sign the RRP policy statement, not the entire RRP plan. Prior experience with effective risk management programs has demonstrated to FRA how important the active involvement of the highest railroad officials is to improving safety and safety culture. Therefore, FRA determined the chief official at the railroad must sign the RRP policy statement.

Paragraph (b)(4) in the NPRM proposed requiring an RRP plan's purpose and scope statement to describe how any person that utilizes or provides significant safety-related services to a railroad (including host railroads, contract operators, shared track/corridor operators, or their contractors) will support and participate in the railroad's RRP. Upon review of the NPRM, FRA believes this provision belongs more appropriately in the § 271.205 requirements regarding an RRP plan's system description. FRA has therefore moved this provision to § 271.205(a)(4), and the section-by-section analysis for that section will discuss this provision further.

Section 271.205 – System description

This section requires an RRP plan to include a statement describing the characteristics of the railroad system. Except for changes made to clarify paragraph (a)(3) and language moved from § 271.203(b)(4) to paragraph (a)(4) of this section, discussed below, FRA adopts this section unchanged from the NPRM. FRA is therefore not repeating the NPRM's section-by-section analysis in this final rule but refers interested readers to the NPRM's discussion. *See* 80 FR 10974 (Feb. 27, 2015). FRA did not receive any comments in response to this section.

Paragraph (a)(3) in the NPRM proposed requiring an RRP plan's system description to identify all persons that utilize or perform significant safety-related services on the railroad's behalf (including entities such as host railroads, contract operations, shared track/corridor operators, or other contractors). FRA modified paragraph (a)(3) to clarify its requirements and refers readers to the explanation of those changes in the section-by-section analysis for § 271.101(d). FRA does not intend these changes to affect the substance of the rule.

FRA is also adding a paragraph (a)(4) to this section that contains language from § 271.203(b)(4) in the NPRM, which proposed requiring an RRP plan to include a purpose and scope statement describing how any person that utilizes or provides significant safety-related services to a railroad (including host railroads, contract operators, shared track/corridor operators, or other contractors) will support and participate in the railroad's RRP. Because this section requires a railroad's RRP plan to identify such persons as part of its system description, FRA concluded the requirement to describe how such persons will support and participate in the railroad's RRP fits better in this section. FRA's changes are for clarity only. Paragraph (a)(4) requires an RRP plan's

system description to describe how the railroad will ensure any person identified under paragraph (a)(3) of this section will support and participate in the railroad's RRP. As an example, paragraph (a)(4) states the system description must describe the extent to which such persons will, as part of the railroad's RRP, help identify hazards, develop and implement mitigation strategies, conduct internal annual assessments, or otherwise perform actions this part requires.

Section 271.207 – Consultation requirements

Section 271.207 implements section 20156(g)(1), which states a railroad required to establish an RRP must consult with, employ good faith, and use its best efforts to reach agreement with, all its directly affected employees, including any non-profit employee labor organization representing a class or craft of directly affected employees of the railroad carrier, on the contents of the RRP plan. This section also implements section 20156(g)(2), which further provides that if a railroad carrier and its directly affected employees, including any nonprofit employee labor organization representing a class or craft of directly affected employees of the railroad carrier, cannot reach consensus on the proposed contents of the RRP plan, then directly affected employees and such organizations may file a statement explaining their views on the plan on which consensus was not reached. *See* 49 U.S.C. 20156(g)(2). The RSIA requires FRA to consider these views during review and approval of a railroad's RRP plan. *Id.*

FRA made several changes to this section from the NPRM. These changes respond to comments received, conform this rule to the SSP final rule, and renumber certain paragraphs for better organization. For clarity, FRA is briefly discussing each provision of this section, even provisions FRA adopts unchanged from the NPRM. To

promote consistency with the SSP final rule, FRA has changed the title of this section from “consultation process description” to “consultation requirements.” *See* 49 CFR 270.107. This discussion also notes minor differences between the consultation provisions in the RRP and SSP rules.

Paragraph (a)(1) implements section 20156(g)(1) by requiring a railroad to consult with its directly affected employees on the contents of its RRP plan, including any non-profit employee labor organization representing a class or craft of the railroad’s directly affected employees. As part of that consultation, a railroad must utilize good faith and best efforts to reach agreement with its directly affected employees on the contents of its plan. FRA has not changed this language from the NPRM.

Paragraph (a)(2) specifies a railroad that consults with a non-profit employee labor organization is considered to have consulted with the directly affected employees that organization represents.

Paragraph (b) states a railroad must have a preliminary meeting with its directly affected employees to discuss how the consultation process will proceed. While the NPRM did not include this language, FRA added it merely as an introductory clause for the subsequent requirements in paragraphs (b)(1) through (4), discussed below, which were all included in proposed paragraphs (a)(3) through (6) of the NPRM. FRA believes including the preliminary meeting requirements in a separate paragraph (b) improves the organization and clarity of this section.

Some commenters to the corresponding consultation provision of the SSP NPRM appeared to believe this preliminary meeting must discuss the substance of the RRP plan. To rectify this misunderstanding, FRA is adding language in paragraph (b) specifying a

railroad is not required to discuss the substance of an RRP plan during this preliminary meeting. Rather, the preliminary meeting may be administrative in nature so all parties understand the consultation process and may engage in substantive discussions as soon as possible after the § 271.11 protections become applicable. The preliminary meeting is also an opportunity for the railroad to educate directly affected employees on risk reduction and how it may affect them. The SSP final rule incorporates substantively identical language. *See* 81 FR 53883 and 53900 (Aug. 12, 2016).

Paragraphs (b)(1) through (3) contain the deadlines Class I railroads, ISP railroads, and railroads that STB reclassifies or newly classifies as Class I railroads must meet to hold the preliminary meeting with their directly affected employees. FRA merely renumbered these provisions from paragraphs (a)(3) through (5) of the NPRM to paragraphs (b)(1) through (3) in this final rule. This reorganization does not affect the substance of these paragraphs. FRA refers interested readers to the NPRM discussion of paragraphs (a)(3) through (5) for additional information. *See* 80 FR 10975 (Feb. 27, 2015).

Paragraph (a)(6) of the NPRM, stating a voluntarily-compliant railroad must also consult with its directly affected employees using good faith and best efforts, is in paragraph (b)(4) of the final rule. Paragraph (a)(6) also proposed, however, that because there is no deadline for a voluntarily-compliant railroad to file an RRP plan with FRA, there would also be no requirement for a voluntarily-compliant railroad to meet with its directly affected employees within a certain timeframe. Because FRA decided to include a notification and filing deadline for voluntarily-compliant railroads in § 271.301(b)(4)(i), discussed below, FRA is adding language in paragraph (b)(4) that applies to voluntarily-

compliant railroads the same consultation deadlines for ISP railroads and railroads that STB reclassifies or newly classifies as Class I railroads.

Labor Organizations I commented that this section requires railroad management and labor to have only one, non-substantive administrative meeting. To correct any implication that this is the only meeting a railroad must hold to comply with all the consultation process requirements of this section, FRA added language to paragraph (b)(5) clarifying the mandatory preliminary meeting does not constitute full compliance with the consultation process requirements of this section. Although the NPRM did not include this language, it does not impose any additional substantive requirement. The SSP rule does not contain this provision because a similar comment was not received in response to the SSP NPRM. FRA does not intend this to indicate a substantive difference between the consultation requirements of the SSP and RRP rules.

Paragraph (a)(7) of the NPRM, which directed readers to appendix B for additional guidance on how a railroad can comply with the consultation process requirements of this section, is paragraph (c) of the final rule. FRA renumbered this paragraph for better organization and clarity and changed it to direct readers to appendix A instead of appendix B (for reasons discussed in the section-by-section analysis for appendices A and B). FRA discusses appendix A later in this preamble.

Paragraph (d) of the final rule, requiring a railroad to submit, together with its RRP plan, a consultation statement, was paragraph (b) in the NPRM. The consultation statement must contain specific information described in paragraphs (d)(1) through (3) of this final rule, which were renumbered from paragraphs (b)(1), (2), and (4) in the NPRM. Paragraph (d)(1), which requires a consultation statement to describe the process a

railroad uses to consult with its directly affected employees, is unchanged from paragraph (b)(1) of the NPRM.

If the railroad cannot reach agreement with its directly affected employees on the contents of its RRP plan, paragraph (d)(2) requires the consultation statement to identify any areas of non-agreement and provide the railroad's explanation for why it believed agreement was not reached. FRA made a minor editorial change to paragraph (d)(2) to be consistent with the SSP final rule by changing the phrase "was not able to" to "could not." *See* 81 FR 53901 (Aug. 12, 2016). This change does not affect the substance of this provision. Additionally, while the NPRM used the term "disagreement," FRA changed this to "non-agreement" in the final rule to conform more closely with the statutory language in section 20156(g)(1). Although the SSP rule uses "disagreement" instead of "non-agreement," FRA does not intend this to indicate a substantive difference between the consultation requirements of the SSP and RRP rules.

Paragraph (b)(3) of the NPRM proposed that if the RRP plan would affect a provision of a collective bargaining agreement between the railroad and a non-profit employee labor organization, the consultation statement must identify that provision and explain how the railroad's RRP plan would affect it. In response to the NPRM, AAR/ASLRRRA commented this provision went too far because collective bargaining is a matter between railroads and their employees beyond FRA's jurisdiction. FRA agrees and is not including this provision in the final rule.

Under paragraph (d)(3) of the final rule, proposed as paragraph (b)(4) of the NPRM, the consultation statement must include a service list of the names and contact information for the international/national president of any non-profit employee labor

organization representing directly affected employees and any directly affected employee not represented by a non-profit employee labor organization who significantly participated in the consultation process. FRA did not make any substantive changes to this provision but FRA made the following editorial changes to promote consistency with the SSP final rule and to improve clarity. Although the first sentence in the NPRM addressed both international/national presidents of any non-profit employee labor organization and individual directly affected employees, FRA separated this requirement into two separate sentences and made additional changes to clarify a railroad must include only a directly affected employee who significantly participated in the consultation process on the service list if that employee participated independent of a non-profit employee labor organization. FRA also modified the second to the last sentence of paragraph (d)(3) to add a reference to the plan submission requirements of § 271.301 and to clarify that a railroad must simultaneously provide its RRP plan and consultation statement to individuals the service list identifies. These changes do not affect the substance of this paragraph.²⁵

Under paragraph (e)(1) of the final rule, proposed as paragraph (c)(1) in the NPRM, if a railroad and its directly affected employees cannot reach agreement on the proposed contents of an RRP plan, then a directly affected employee may file a statement with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer explaining his or her views on the plan on which agreement was not reached. *See* 49

²⁵ FRA notes that paragraph (d)(3) in the RRP final rule contains two provisions not in the SSP rule. The first provision states that if an international/national president did not participate in the consultation process, the service list must include information for the designated representative who participated on his or her behalf, and the second states that a railroad may send documents to individuals on the service list via electronic means or other service means reasonably calculated to succeed. The RRP NPRM proposed these provisions (*see* 80 FR 10994 (Feb. 27, 2015)), and their non-inclusion in the SSP final rule was an oversight.

U.S.C. 20156(g)(2). Except for correcting a typo in the proposed rule (replacing “then directly affected employees” with “the directly affected employees”) and specifically identifying the address for the FRA Associate Administrator for Railroad Safety and Chief Safety Officer, FRA has not changed this paragraph from the NPRM. The above changes do not affect the substance of this paragraph.

Paragraph (e)(2) of the final rule, proposed as paragraph (c)(2) in the NPRM, specifies that a railroad’s directly affected employees have 30 days following the railroad’s submission of its proposed RRP plan to submit the statement described in paragraph (e)(1) of this section. While the NPRM proposed giving directly affected employees 60 days to submit their statement, FRA believes that 30 days is more appropriate. This decision takes into account that paragraph (b)(3) ensures directly affected employees are provided the RRP plan and the consultation statement at the same time the railroad provides these documents to FRA for review. Moreover, under § 271.301(d) of the final rule (discussed below), FRA will review an RRP plan within 90 days of receipt. As a result, if the directly affected employees had 60 days to submit a statement when agreement on the RRP plan was not reached, FRA would have only 30 days to consider the directly affected employees’ view while reviewing the RRP plan. Thirty days would not be enough time to ensure that FRA sufficiently considered the directly affected employees’ views during the RRP review process. Finally, the deadline is identical to the deadline for directly affected employee statements in § 271.107(c)(2), which was also changed from a proposed 60-day deadline in the SSP NPRM. *See* 81 FR 53886 (Aug. 12, 2016). To further promote consistency with the SSP final rule, FRA has

also removed a reference in proposed paragraph (c)(2) to § 271.301(a)(4). *See* 49 CFR 271.107(c)(2).

In the preamble to the NPRM, FRA explained that it would help a railroad develop its RRP. The preamble to the SSP NPRM expressed a similar intent. Labor Organizations I commented expressing concern that this preamble language indicates that FRA will work exclusively with the railroads, precluding the involvement of any other interested party. Labor Organizations I fear that this would substitute FRA for the directly affected employees in the statutorily-mandated consultation role.

This was not FRA's intent in the preamble discussion. Rather, FRA meant to communicate that FRA would be available to provide guidance to the railroads on the various aspects of the rule, not that there would be an exclusive partnership between FRA and the railroads to develop RRP. FRA guidance to railroads will not replace Labor Organizations I or any directly affected employee in the consultation role. Under the consultation process required by § 271.207, a railroad must use good faith and best efforts to reach agreement with directly affected employees on the railroad's RRP plan. While the section-by-section analysis discusses "good faith" and "best efforts" further, a railroad will not be able to meet these standards merely by submitting the required consultation statement. Directly affected railroad employees will therefore always have an opportunity to provide input on the railroad's RRP plan, regardless of guidance FRA provides the railroad on developing an RRP plan.

Labor Organizations I also argue that FRA improperly classified the process under section 20156(g) as one of consultation. Rather, Labor Organizations I believe that

section 20156(g) requires a railroad to negotiate or bargain with directly affected employees in accordance with the legal authority of the Railway Labor Act, as amended.

FRA disagrees. Nothing in section 20156(g) requires a railroad to negotiate or bargain with directly affected employees on the contents of an RRP plan. Rather, section 20156(g) requires a railroad to “consult with, employ good faith and use [its] best efforts to reach agreement with” directly affected employees (including Labor Organizations I). Throughout SSP and RRP RSAC meetings, FRA referred to this process as one of consultation, not negotiation or bargaining. The NPRM proposed text contained language identical to language in section 20156(g), and FRA does not believe that this language requires a process of negotiation or bargaining consistent with the Railway Labor Act. Requiring a process of negotiation or bargaining would therefore be beyond the scope of FRA’s authority in section 20156(g).

Labor Organizations I also expressed concern that various estimates regarding employee involvement and the consultation process in the Regulatory Impact Analysis and the Paperwork Reduction Act analysis were too low. Labor Organizations I claim the estimated time periods were too short and would result in an inconsequential amount of time for consultation on the contents of the plan. FRA notes that the time periods in the analyses were only estimates and that the analyses requested comment on these estimates. *See* 80 FR 10988 and Regulatory Impact Analysis, at ii (Feb. 27, 2015). While Labor Organizations I did not provide suggested estimates that they believe are more appropriate, FRA has changed the final rule to add § 271.113 (discussed above), which requires a railroad to involve its directly affected employees in the establishment and implementation of an RRP. FRA has also updated its estimates of the time RRP

safety outreach is expected to take, required under § 271.107 of the final rule, from 15 minutes to 60 minutes per employee.²⁶

Labor Organizations I also expressed concern that the NPRM did not contain a penalty schedule or otherwise propose a mechanism for enforcing the consultation process requirements. Labor Organizations I specifically suggested that the DOT Secretary and the President of the United States “publish an Executive Order supplementing enforcement of [section] 103 by providing for suspension and cancellation of federal payments and benefits to contracting railroads similar to Sec. 7 of E.O. 13,496, ... codified at 29 CFR [] 471.14.”

Regarding the lack of a penalty schedule, FRA typically does not include penalty schedules in an NPRM. Section 271.9(a) of this final rule, however, refers readers to FRA’s website for a penalty schedule. Because a penalty schedule is a statement of agency policy, FRA was not required to provide notice and comment before its issuance. *See* 5 U.S.C. 553(b)(3)(A). FRA also notes that none of its enforcement authority is supplemented by a Presidential executive order. FRA concludes, therefore, that an executive order is not necessary to enforce the RRP requirements, even assuming that the President concluded that such an executive order would be legal and appropriate.

Section 271.209 – Consultation on amendments

This section describes the consultation process requirements for amendments to a railroad’s RRP plan. Except for replacing an incorrect reference to “system safety program” with the correct “RRP plan” and replacing the incorrect term “paragraph” with “section,” FRA adopts this section unchanged from the NPRM. FRA is therefore not

²⁶ For additional discussion, see Section 4.1., Consultation: Time Needed to Consult (Economic Impact) and Timeline, of the Regulatory Impact Analysis accompanying this final rule.

repeating the NPRM's section-by-section analysis in this final rule, but refers interested readers to the NPRM's discussion. *See* 80 FR 10976 (Feb. 27, 2015). FRA did not receive any comments on this section.

Section 271.211 – Risk-based hazard management program process

This section requires an RRP plan to describe the railroad's process for conducting a risk-based HMP. Because FRA received no comments and adopts this section unchanged from the NPRM (except for editorial changes in paragraph (c) to standardize its approach with paragraph (b) and to clarify that the section's requirements are minimal requirements), FRA is not repeating the NPRM's section-by-section analysis in this final rule, but refers interested readers to the NPRM's discussion. *See* 80 FR 10976 (Feb. 27, 2015).

Section 271.213 – Safety performance evaluation process

This section requires an RRP plan to describe the railroad's processes for identifying and analyzing its safety culture under § 271.105, monitoring safety performance under § 271.105(b), and conducting safety assessments under § 271.105(c). While this section proposed requiring an RRP plan to describe a railroad's processes for "measuring" safety culture in the NPRM, FRA replaced the term "measuring" with the phrase "identifying and analyzing" for reasons discussed in the above section-by-section analysis for § 271.105. FRA otherwise adopts this section unchanged from the NPRM. *See* 80 FR 10976 (Feb. 27, 2015).

Section 271.215 – Safety outreach process

This section requires an RRP plan to describe a railroad's processes for communicating safety information to railroad personnel and management under §

271.107. FRA received no comments and adopts this section unchanged from the NPRM, except for exchanging the word “process” with “processes.” FRA is therefore not repeating the NPRM’s section-by-section analysis in this final rule, but refers interested readers to the NPRM’s discussion. *See* 80 FR 10976 (Feb. 27, 2015).

Section 271.217 – Technology implementation plan process

This section requires an RRP plan to describe a railroad’s processes for conducting a technology analysis pursuant to § 271.109(b) and for developing a technology implementation plan pursuant to § 271.109(c). FRA received no comments and adopts this section unchanged from the NPRM. FRA is therefore not repeating the NPRM’s section-by-section analysis in this final rule, but refers interested readers to the NPRM’s discussion. *See* 80 FR 10976 (Feb. 27, 2015).

Section 271.219 – Implementation and support training plan

This section requires an RRP plan to contain a training plan describing the railroad’s processes for training, under § 271.111, employees with significant responsibility for implementing and supporting the RRP. Paragraph (a) in the NPRM specified these employees must include persons a railroad identifies under § 271.205(a)(3) as utilizing or performing significant safety-related services on the railroad’s behalf. For reasons explained in the section-by-section analysis for § 271.101(d) above, FRA clarified the requirements of this provision. The modified language states that the employees must include employees that a railroad identifies under § 271.205(a)(3) as performing on the railroad’s behalf significant safety-related services or utilizing safety-related services provided by the railroad for railroad operations purposes. FRA has not otherwise changed paragraph (a) of this section.

Paragraph (b) in the NPRM proposed requiring the training plan to describe the content and frequency of the RRP training for each position or job function a railroad identifies under § 271.223(b)(3) as having significant responsibilities for implementing the RRP. FRA modified the proposed language in two ways. First, FRA changed the § 271.223(b)(3) reference to § 271.225(b)(3) due to FRA's inclusion of a new § 271.221 in the final rule, discussed below, which resulted in the renumbering of subsequent sections in subpart C of the final rule. AAR/ASLRRA also commented there was some inconsistency in the NPRM because it discusses the training requirement as a one-time event, but also mentions training frequency. FRA has addressed this inconsistency by not including the term "frequency" in this section, unlike the proposed language.

AAR/ASLRRA are correct that the term is not necessary because the training is a one-time event. FRA has not otherwise changed paragraph (b) of this section.

Section 271.221 – Involvement of railroad employees process

This section requires an RRP plan to describe the railroad's processes for involving railroad employees in the establishment and implementation of an RRP under § 271.113. For reasons discussed in the section-by-section analysis for § 271.113 above, FRA did not specifically propose this requirement in the NPRM, but is including it in the final rule to clarify a railroad must involve its employees in the RRP.

This section in the NPRM contained RRP plan requirements for a railroad's internal assessment process in the NPRM. To accommodate this RRP plan involvement requirement, FRA moved the internal assessment process requirements to § 271.223 and renumbered the rest of subpart C accordingly.

Section 271.223 – Internal assessment process

Paragraph (a) of this section, proposed as § 271.221 in the NPRM, requires an RRP plan to describe a railroad's processes for conducting an internal assessment of its RRP under proposed subpart E. Paragraph (b) is reserved. FRA did not receive any comments on this section and, except for moving it to this section in the final rule, adopts this section unchanged from the NPRM. FRA is therefore not repeating the NPRM's section-by-section analysis in this final rule, but refers interested readers to the NPRM's discussion. *See* 80 FR 10976-10977 (Feb. 27, 2015).

Section 271.225 – RRP implementation plan

Paragraph (a) of this section, proposed as § 271.223 in the NPRM, requires an RRP plan to describe how the railroad will implement its RRP. Except for editorial changes in paragraph (a) and (b)(3), discussed below, FRA adopts this section unchanged from the NPRM. These changes do not affect the substance of this section and FRA did not receive any comments on this section. FRA is therefore not repeating the NPRM's entire section-by-section analysis in this final rule, but refers interested readers to the NPRM's discussion. *See* 80 FR 10977 (Feb. 27, 2015).

FRA modified paragraph (a) to change language in the second sentence from passive to active voice, clarifying that the railroad must fully implement the entire RRP within 36 months of FRA's approval of the plan.

For reasons explained in the section-by-section analysis for § 271.101(d), above, FRA modified the language of paragraph (b)(3) to clarify its requirements. Paragraph (b)(3) requires a railroad's implementation plan to describe the roles and responsibilities of each position or job function with significant responsibility for implementing the railroad's RRP. Paragraph (b)(3) that this includes positions held by contractors that

either perform significant safety-related services on the railroad's behalf or utilize significant safety-related services the railroad provides.

Subpart D—Review, Approval, and Retention of Risk Reduction Program Plans

The RSIA requires a railroad to submit its RRP, including any of the required plans, to the FRA Administrator (as delegate of the Secretary) for review and approval. *See* 49 U.S.C. 20156(a)(1)(B). Subpart D, Review, Approval, and Retention of System Safety Program Plans, contains requirements addressing this mandate.

Section 271.301 – Filing and approval

This section contains requirements for the filing of an RRP plan and FRA's approval process. While FRA did not receive any comments on this section, FRA modified this section from the NPRM as discussed below. For background discussion on provisions that FRA has not changed, FRA refers readers to the NPRM's discussion. *See* 80 FR 10977-10978 (Feb. 27, 2015).

Paragraph (a) generally requires a railroad to submit a copy of its RRP plan to the FRA Associate Administrator for Railroad Safety and Chief Safety Officer. Paragraph (a) of the NPRM also contained the RRP plan submission deadlines for Class I railroads, railroads with inadequate safety performance, railroads that the STB classifies or newly classifies as a Class I railroad, and voluntarily compliant railroads. For organizational clarity, FRA moved these deadlines to paragraph (b) and made each deadline separate paragraphs (b)(1) through (4). FRA is further modifying the deadline for ISP railroads in paragraph (b)(2). While the NPRM proposed requiring an ISP railroad to provide FRA an RRP plan no later than 90 days after receiving final notification from FRA under § 271.13, FRA is extending this timeline to 180 days in the final rule to account for the

petition process FRA is including in § 271.13(f). Paragraphs (a)(1) through (4) of the NPRM also contained certain requirements for the RRP plan, which FRA moved to paragraph (c) in the final rule. These organizational changes resulted in the renumbering of the other paragraphs in this section but do not affect the substance of the rule.

While the NPRM proposed that a voluntarily-compliant railroad could submit an RRP plan to FRA for review and approval at any time, FRA concluded the proposed approach is vague. FRA based its conclusion on the fact that it leaves uncertainty about when a voluntarily-compliant railroad begins to compile and collect information solely for RRP purposes such that the rule's information protection provisions would apply. Paragraph (b)(4)(i) of the final rule therefore states a voluntarily-compliant railroad must provide FRA written notice of its intent to submit an RRP plan for FRA's review and approval. Under paragraph (b)(4)(ii), the date FRA receives the written notice or [INSERT DATE 366 DAYS AFTER THE DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], whichever is later, is the date the voluntarily-compliant railroad may begin to compile or collect information solely for the purpose of planning, implementing, or evaluating an RRP under the information protection provisions of § 271.11. To ensure a voluntarily-compliant railroad does indeed submit an RRP plan for FRA's review and approval once the railroad begins compiling or collecting information solely for RRP purposes, paragraph (b)(4)(iii) states a voluntarily-compliant railroad must submit its RRP plan for review and approval no later than 180 days after FRA receives the railroad's written notice. This is the same amount of time an ISP railroad has to submit its RRP plan under paragraph (b)(2).

Paragraphs (c)(1) through (4), proposed as paragraphs (a)(1) through (4) of the NPRM, require a railroad to provide certain additional information as part of its submission. Aside from the reorganization, FRA did not make any changes to the language in paragraphs (c)(1) and (2). For reasons explained by the section-by-section analysis for § 271.101(d), above, FRA changed paragraph (c)(3) to clarify its requirements. Paragraph (c)(3) requires a railroad's RRP plan to include the contact information for the senior representatives of any person that has entered into a contractual relationship with the railroad to either perform significant safety-related services on the railroad's behalf or to utilize significant safety-related services the railroad provides for railroad operations. This includes the senior representatives of host railroads, contract operators, shared track/corridor operators, and other contractors. This change does not affect the substance of this provision.

Paragraph (c)(4), proposed as paragraph (a)(4) in the NPRM, requires a railroad to submit a statement describing how it consulted with its directly affected employees on the contents of its RRP plan under § 271.207(d). This paragraph also reminds directly affected employees that they have 30 days following the railroad's submission of its proposed RRP plan to file a statement under § 271.207(e)(2). FRA has made three changes to these requirements from the NPRM. First, this paragraph referenced § 271.207(b) and (c) in the NPRM, and FRA changed these references to § 271.207(d) and (e)(2) to reflect organizational changes to § 271.207. For plain language purposes, FRA also changed the phrase "in accordance with" to "under." These changes do not affect the substance of this requirement. Finally, while the NPRM proposed providing directly affected employees 60 days to submit a statement following a railroad's submission of its

RRP plan, FRA believes 30 days is more appropriate. The section-by-section analysis for § 271.207(e)(2) explains why FRA has made this change.

Paragraph (d), proposed as paragraph (b) in the NPRM, explains how FRA will approve a railroad's RRP plan. Except for updating references to reflect organizational changes in § 271.207, making a non-substantive editorial change in paragraph (d)(1), extending a deadline in paragraph (d)(3), and adding minor provisions in paragraphs (d)(3) and (4), FRA adopts this paragraph unchanged from the NPRM. In paragraph (d)(1), FRA changed the language "prior to the commencement of railroad operations" to "before the start of railroad operations" for plain language purposes. Under paragraph (d)(3), when a railroad receives notification that FRA has not approved its plan and notice of the specific points in which the plan is deficient, the railroad has 90 days to correct all of the deficiencies identified and resubmit the plan to FRA. Both the SSP NPRM and the RRP NPRM proposed giving a railroad 60 days to correct identified deficiencies, but FRA received comments in response to the SSP NPRM expressing concern that 60 days was not a sufficient amount of time for a railroad to address the deficient points of an SSP plan. *See* 81 FR 53888 (Aug. 12, 2016) and 80 FR 10995 (Feb. 27, 2015). The SSP final rule addressed this concern by extending the deadline to 90 days, and this final rule does the same to keep the rules consistent. *See* 49 CFR 270.201(b)(3) and 81 FR 53888 (Aug. 12, 2016). FRA has also modified paragraph (d)(3) to include language indicating that FRA will review a corrected RRP plan within 60 days of receipt.

FRA has modified paragraph (d)(4) to include language stating FRA's approval of a railroad's RRP plan does not constitute approval of the specific actions the railroad will

implement under its RRP plan and shall not be construed as establishing a Federal standard regarding those specific actions. Section V.A.5 of the preamble, above, explains that FRA has added this language to specifically preserve State claims.

Paragraph (e), proposed as paragraph (c) in the NPRM, specifies that all documents required to be submitted to FRA under this part may be submitted electronically under the procedures in appendix B to this part. Other than the reorganization and directing readers to appendix B instead of appendix C, as proposed in the NPRM (for reasons discussed in the section-by-section analysis for appendix B), FRA adopts this provision unchanged from the NPRM.

Section 271.303 – Amendments

This section addresses the process a railroad must follow whenever it amends its FRA-approved RRP plan, regardless of whether the amendments are substantive or non-substantive. Except for additional language FRA added to paragraph (a) and clarifying changes in paragraphs (b) and (c), discussed below, FRA adopts this section unchanged from the NPRM. FRA also did not receive any comments on this section. For discussion on provisions FRA has not changed, FRA refers interested readers to the NPRM's discussion. *See* 80 FR 10978 (Feb. 27, 2015).

Paragraph (a) in the NPRM stated that for substantive amendments, a railroad must follow the process in its RRP plan under § 271.209 for consulting with its directly affected employees. In the final rule, FRA renumbered this provision paragraph (a)(1) and added language clarifying that a railroad must also submit a consultation statement to FRA. FRA also added language in paragraph (a)(2) specifying that if a railroad and its directly affected employees cannot reach agreement on the proposed contents of a

substantive amendment, the directly affected employees may file a statement with FRA under § 271.207(e)(1) procedures. Paragraph (a)(2) gives directly affected employees 15 days following the railroad's submission of the proposed amendment to submit a statement. Fifteen days is sufficient time for the statement because issues associated with amending an RRP plan are likely to be less complex than issues associated with initially developing a new RRP plan. FRA is including this provision because FRA believes a railroad substantively amending its RRP plan must follow all the consultation process requirements that apply when a railroad is initially developing a plan. A railroad cannot either evade consultation process requirements or deprive directly affected employees of the opportunity to submit a statement to FRA by substantively amending an RRP plan FRA already approved. This paragraph does not apply to non-substantive amendments (e.g., amendments updating names and addresses of railroad personnel). If a railroad is uncertain whether a proposed amendment is substantive or non-substantive, it should contact FRA for guidance.

Paragraph (b) contains requirements for filing an RRP plan amendment. The only change FRA made to this paragraph was to replace "prior to" with "before" for plain language purposes.

Paragraph (c) describes how FRA will review and approve a railroad's proposed amendment. Paragraph (c)(1) in the NPRM stated that FRA will review an amendment within 45 days of receipt and then notify the primary contact person of the railroad whether FRA approves the proposed amendment. FRA made non-substantive editorial changes to this provision to improve clarity and change passive voice to active voice. FRA also added language in paragraphs (c)(1) and (2) clarifying that FRA will also

provide this notification to each individual identified in the service list accompanying the consultation statement under § 271.303(a)(1). Once again, FRA added this language to ensure the process for approving substantive amendments is the same as the process for initially approving a railroad's RRP plan. FRA adopts paragraph (c)(3) unchanged from the NPRM. *See* 80 FR 10978 (Feb. 27, 2015).

Section 271.305 – Reopened review

This section provides that, for cause stated, FRA may reopen review of an RRP plan or amendment (in whole or in part) after approval of the plan or amendment. While this section of the NPRM stated that FRA may “reopen consideration” of an RRP plan or amendment, FRA has replaced this phrase with “reopen review” because “review” is the term used in the section title and elsewhere in the final rule to describe FRA's role in approving an RRP plan. The determination of whether to reopen review is solely within FRA's discretion on a case-by-case basis. As an example, the NPRM explained that FRA could reopen review if it determines the railroad has not been complying with its plan/amendment or if FRA obtains information that was not available when FRA originally approved the plan or amendment.

In response to this section in the NPRM, AAR/ASLRRA commented the phrase “for cause stated” was unlimited and this section was unacceptably vague. FRA does not believe this provision needs additional specificity. FRA further notes that reopening an RRP plan for review does not necessarily mean the plan does not comply with the final rule. FRA will work with a railroad and its directly affected employees if it reopens review to ensure the railroad and employees understand and can address FRA's cause stated.

Section 271.307 – Retention of RRP plans

This section contains requirements for railroads to retain their RRP plans. Except for adding language in paragraph (b) clarifying that a railroad must also make a copy of any subsequent amendment to an RRP plan available for inspection and copying (in addition to the plan itself), FRA adopts this section unchanged from the NPRM. FRA also did not receive any comments on this section so it is therefore not repeating the NPRM’s section-by-section analysis, but refers interested readers to the NPRM’s discussion. *See* 80 FR 10978 (Feb. 27, 2015).

Subpart E – Internal Assessments

To help ensure an RRP is properly implemented and effective, a railroad must evaluate its program annually. Subpart E contains the railroad requirements to conduct an internal assessment of its RRP. FRA did not receive any comments on this subpart. Except for updating references in the NPRM to reflect organizational changes in the final rule²⁷ and the minor changes discussed below for §§ 271.403 and 271.405, FRA adopts this subpart unchanged from the NPRM. FRA is therefore not repeating the NPRM’s section-by-section analysis in this final rule, but refers interested readers to the NPRM’s discussion. *See* 80 FR 10978-10979 (Feb. 27, 2015).

Section 271.403—Internal assessment improvement plans

Paragraph (b)(2) in this section of the NPRM stated that a railroad’s improvement plan must describe recommended improvements, “including any necessary revisions or updates to the RRP plan which would be made through the amendment process....” FRA believes the term “necessary” is vague, and therefore changed this language in the final

²⁷ To reflect organizational changes in the final rule, FRA changed a reference in § 271.401(a) from § 271.301(b) to § 271.301(d) and a reference in § 271.401(b)(1) from § 271.223(b) to § 271.225(b).

rule to read, “including any proposed revisions or updates to the RRP plan the railroad expects to make through the amendment process...” The changed language also clarifies that these are amendments the railroad expects to make. FRA does not intend these changes to change the substance of this paragraph.

Section 271.405—Internal assessment reports

FRA has made changes to paragraph (b)(3) of this section to conform its language with the changes FRA has made to § 271.403(b)(2), discussed above.

Subpart F – External Audits

This subpart explains FRA’s process for conducting audits of the railroad’s RRP and establishes requirements for the actions a railroad must take in response to FRA’s audits. FRA’s audits will focus on reviewing the railroad’s RRP process and ensuring that the railroad is following the processes and procedures described in its FRA-approved RRP plan. FRA did not receive any comments on this subpart and except for a modification to § 271.501 discussed below, adopts it unchanged from the NPRM. FRA is therefore not repeating the NPRM’s section-by-section analysis in this final rule, but refers interested readers to the NPRM’s discussion. *See* 80 FR 10979 (Feb. 27, 2015).

Section 271.501 – External audits

This section in the NPRM generally stated FRA would cause external audits to be conducted. FRA has modified this section to clarify that a railroad must make documentation kept pursuant to its RRP plan available to FRA or State railroad safety inspectors for copying and inspection.

Appendix A to Part 271—Federal Railroad Administration Guidance on the Risk Reduction Program Consultation Process

As proposed in the NPRM, FRA intended appendix A to contain a schedule of civil penalties for use in connection with this final rule. However, FRA has decided to provide such a schedule on its website instead of as an appendix to the final rule. Please see the discussion of § 271.9, Penalties and responsibility for compliance, in the section-by-section analysis for further details.

FRA is therefore moving appendix B, as proposed in the NPRM, to appendix A in the final rule. Appendix A contains guidance on complying with § 271.207, which states that a railroad must in good faith consult with, and use its best efforts to reach agreement with, all of its directly affected employees on the contents of the RRP plan. The appendix begins with a general discussion of the terms “good faith” and “best efforts,” explaining they are separate terms and each has a specific and distinct meaning. For example, the good faith obligation is concerned with a railroad’s state of mind during the consultation process, and the best efforts obligation is concerned with the specific efforts a railroad makes to try to reach agreement with its directly affected employees. The appendix also explains that FRA will determine a railroad’s compliance with the § 271.207 requirements on a case-by-case basis and explains that FRA may disapprove a plan if a railroad fails to consult with its directly affected employees in good faith and use best efforts.

Further, the appendix contains specific guidance on the process a railroad may use to consult with its directly affected employees. This guidance does not establish prescriptive requirements a railroad must comply with, but provides a road map as an example of how a railroad may conduct the consultation process. The guidance also distinguishes between employees who are represented by a non-profit employee labor

organization and employees who are not, as the processes a railroad may use to consult with represented and non-represented employees could differ significantly. Overall, however, the appendix stresses there are many ways a railroad may choose to consult with its directly affected employees to comply with the rule. Therefore, it is important to maintain a flexible approach to the § 271.207 consultation process requirements, so a railroad and its directly affected employees may consult in the manner best suited to their specific circumstances.

Appendix B to Part 271—Procedures for Submission of RRP Plans and Statements from Directly Affected Employees

Appendix B in the NPRM proposed guidance on complying with the consultation process requirements, and has been moved to appendix A in the final rule for reasons discussed above. FRA is therefore moving appendix C, as proposed in the NPRM, to appendix B in the final rule. Appendix B provides railroads and directly affected employees the option to file RRP plans or consultation statements electronically. The NPRM requested comment regarding whether FRA should allow electronic submission of RRP materials. FRA did not receive any comments against electronic submission and, therefore, is including this appendix unchanged in the final rule.

FRA will create a secure document submission site and will need basic information from railroads or directly affected employees before setting up a user's account. To provide secure access, FRA will also need information on the railroad's points of contact. FRA anticipates it will be able to approve or disapprove all or part of a program and generate automated notifications by email to a railroad's points of contact. Thus, each point of contact must understand that by providing any email addresses, the

railroad is consenting to receive approval and disapproval notices from FRA by email. Railroads that allow notice from FRA by email benefit from receiving such notices quickly and efficiently.

Railroads that choose to submit printed materials to FRA must deliver them directly to the specified address. Some railroads may choose to deliver a CD, DVD, or other electronic storage format to FRA rather than requesting access to upload the documents directly to the secure electronic database. Although that is an acceptable method of submission, FRA encourages each railroad to utilize the electronic submission capabilities of the system. If FRA cannot read the type of electronic storage format sent, FRA will reject the submission.

VII. Regulatory Impact and Notices

A. Executive Orders 12866 and 13771, Congressional Review Act, and DOT Regulatory Policies and Procedures

This rule is a significant regulatory action within the meaning of Executive Order 12866 (EO 12866) and DOT policies and procedures. *See* 44 FR 11034 (Feb. 26, 1979). FRA made this determination by finding that, although the economic effects of this regulatory action would not exceed the \$100 million annual threshold defined by EO 12866, the rule is significant because of the substantial public interest in transportation safety. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a 'major rule', as defined by 5 U.S.C. 804(2). Additionally, this final rule is considered an EO 13771 regulatory action. Details on the estimated costs of this final rule can be found in the rule's RIA, which FRA has prepared and placed in the docket (docket no. FRA-2009-0038). The

RIA details estimated costs the railroads regulated by the rule are likely to incur over a ten-year period.

FRA did not estimate the full incremental costs of railroads conducting additional and systematic hazard and risk analyses or implementing actions to mitigate identified hazards and risks. FRA lacks information to reliably estimate such costs because FRA does not know the specific level of hazards and risks on impacted railroads or the means railroads will use to mitigate these risks. FRA nevertheless expects railroads will implement the most cost-effective mitigations to eliminate or mitigate hazards, and the rule does not require railroads to implement mitigations that would result in net costs. As such, FRA expects that a railroad will only implement mitigation efforts that are net beneficial to the railroad.

The below tables summarize the rule's total costs over a ten-year period based on Class I railroads having a 43-percent pre-compliance rate and ISP railroads having no pre-compliance, with a total cost of \$40.2 million, using a 7-percent discount rate (PV, 7-percent) (Table 5) and \$51.0 million, using a 3-percent discount rate (PV, 3-percent) (Table 6). The annualized costs are \$5.7 million (PV, 7-percent) and \$5.9 million (PV, 3-percent).

Table 5: Summary of the Rule's Total Costs (ten-year period), Assuming 43-percent Class I Pre-rule Compliance; PV, 7-percent

Costs	Class I Railroads	ISP Railroads	All Railroads
Subpart A: General	\$ -	\$ 7,000	\$ 7,000
Subpart B: RR Programs	\$ 35,725,000	\$ 2,216,000	\$ 37,941,000
Subpart C: RRP Plans	\$ 656,000	\$ 1,053,000	\$ 1,709,000
Subpart D: Review and Approval of Plans	\$ 2,000	\$ 7,000	\$ 9,000
Subpart E: Internal Assessments	\$ 171,000	\$ 312,000	\$ 483,000
Subpart F: External Audits	\$ 28,000	\$ 32,000	\$ 60,000
Total Cost	\$ 36,582,000	\$ 3,627,000	\$ 40,209,000
Annualized	\$ 5,210,000	\$ 516,000	\$ 5,726,000

Table 6: Summary of the Rule’s Total Costs (ten-year period), Assuming 43-percent Class I Pre-rule Compliance; PV, 3-percent

Costs	Class I Railroads	ISP Railroads	All Railroads
Subpart A: General	\$ -	\$ 9,000	\$ 9,000
Subpart B: RR Programs	\$ 45,156,000	\$ 3,011,000	\$ 48,167,000
Subpart C: RRP Plans	\$ 771,000	\$ 1,329,000	\$ 2,100,000
Subpart D: Review and Approval of Plans	\$ 2,000	\$ 8,000	\$ 10,000
Subpart E: Internal Assessments	\$ 230,000	\$ 413,000	\$ 643,000
Subpart F: External Audits	\$ 37,000	\$ 43,000	\$ 80,000
Total Cost, 3% present value	\$ 46,197,000	\$ 4,813,000	\$ 51,000,000
Annualized, 3%	\$ 5,416,000	\$ 564,000	\$ 5,979,000

The final rule will require each Class I and ISP railroad to create and implement an RRP. As part of an ongoing process, the final rule will require each railroad and its employees to collaboratively identify, rank, and address safety hazards. FRA concludes that the final rule will result in each affected railroad creating a systematic approach to safety that achieves benefits from inter-department coordination similar to the type of benefits observed through the FRA-sponsored C³RS program.²⁸ FRA expects that the final rule will improve the effectiveness of a railroad’s hazard mitigation efforts, which will result in the primary benefit of decreasing the frequency of accidents/incidents. Other benefits that will come from promulgating the rule include reduced railroad and non-railroad property damage, railroad and highway travel delays, cleanup costs, employee absenteeism, and emergency response costs, among others. Lastly, FRA expects that the final rule will increase railroad productivity and profitability, due to substantially better employee morale, improved working conditions, and a more effective allocation of hazard safety mitigation resources.

²⁸ See U.S. Department of Transportation, Federal Railroad Administration, “Continued Improvement at One C3RS Site”, June 2015, *available at* https://rosap.ntl.bts.gov/view/dot/12204/dot_12204_DS1.pdf (Accessed December 10, 2018).

Benefits that come from the final rule will vary from railroad to railroad. These benefits are based on each railroad's organizational structure, the ability for labor and management to collaborate, and the steps the railroad takes to implement hazard analysis and mitigation. FRA could not reliably predict the specific risks that each freight railroad will identify, the actions each freight railroad will take to mitigate such risks, or the success rate of such actions. Details on the estimated benefits of this final rule can be found in the rule's RIA, which FRA has prepared and placed in the docket (docket no. FRA-2009-0038).

FRA expects that the final rule will increase the effectiveness of railroad hazard mitigation strategies, which will reduce the frequency of accidents and incidents on the general railroad system. FRA also expects that the final rule will result in increased employee morale and improved working conditions, which will improve railroad productivity. These benefits will result because the final rule:

1. Ensures that railroads keep their RRP current and in place;
2. Improves safety culture;
3. Requires ongoing employee involvement and proactive collaboration between labor and management; and
4. Provides information protection, which allows for a systematic risk-based hazard analysis.

The final rule requires each Class I railroad to have a fully implemented RRP within five years of the rule's effective date and requires the first set of ISP railroads to implement all portions of their RRPs within six years after the final rule's effective

date.²⁹ FRA anticipates that railroads may implement some components of their RRP plan before the required implementation dates specified in the final rule. Therefore, this analysis estimates that the final rule will start generating benefits in the fourth year (year 2022), when Class I railroads will have substantially implemented their RRP. As previously discussed, Class I railroads have in place existing activities related to the final rule's required components. The existing levels of pre-rule compliance reduce the size of potential benefits that follow from issuing the final rule.

B. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and Executive Order 13272 (67 FR 53461, Aug. 16, 2002) require agency review of proposed and final rules to assess their impacts on small entities. An agency must prepare a Final Regulatory Flexibility Analysis (FRFA) unless it determines and certifies that a rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. FRA is publishing this FRFA to describe the potential impact of the final rule on small businesses.

1. Statement of Need for, and Objectives of, the Rule

FRA is requiring each Class I freight railroad and ISP freight railroad to develop and implement an RRP, a structured program with proactive processes and procedures a railroad develops and implements to identify and eliminate or mitigate hazards and the resulting risks on its system. An RRP works by encouraging a railroad and its employees to proactively collaborate to identify hazards and determine what, if any, action to take to

²⁹ An ISP railroad should begin to realize benefits approximately three years after FRA approves its RRP plan, the point when the final rule requires the ISP railroad to have fully implemented its RRP. The final rule requires each ISP railroad that is part of the first group of ISP railroads to implement in full an RRP by the sixth year.

eliminate or mitigate the resulting risks. The rule provides each railroad with a substantial amount of flexibility to establish an RRP based on its specific operations. FRA is issuing the RRP rule as part of its efforts to continuously improve rail safety and to satisfy in part the statutory mandate in sections 103 and 109 of the RSIA.

The rule is intended to focus on increased safety, care, and protection of railroad employees, customers, and the general public. The rule will also help ensure railroads provide a safer workplace environment for their employees. Conformance and compliance with the rule, rather than a voluntary system, will better facilitate and ensure industry-wide efforts, resulting in measurable improvement in the performance and quality of safety management processes.

Even though FRA has issued safety regulations and guidance that address many aspects of railroad operations, there are gaps in safety and hazards. Risks may arise from these gaps. RRP's will provide railroads with the tools to systematically and continuously evaluate their systems to identify the gaps in safety and eliminate or mitigate the hazards and risks that result from these gaps.

The rule responds to the Congressional mandate in section 103 of the RSIA, which provides that FRA, by delegation from the Secretary, shall require each Class I railroad and ISP railroad to establish a railroad safety risk reduction program. *See* 49 U.S.C. 20156(a)(1).³⁰ The rule also conforms to section 109 of the RSIA, which directs FRA, by delegation from the Secretary, to conduct a study to determine if it is in the public interest to withhold certain information, including a railroad's assessment of its

³⁰ While the RSIA also directs FRA to require passenger railroads to establish railroad safety risk reduction programs, FRA has published a separate SSP rule that addresses the passenger railroad mandate. *See* 81 FR 53850 (Aug. 12, 2016).

safety risks and its statement of mitigation measures, from discovery and admission into evidence in proceedings for damages involving personal injury and wrongful death.

Section 109 authorizes FRA, by delegation from the Secretary, to prescribe a rule, subject to notice and comment, to address the results of the study. *See* 49 U.S.C. 20119.

The RSIA requirements explain the congressionally mandated need for action. Under 49 U.S.C. 20103(a), “[t]he Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970.” The Secretary’s responsibility under this provision and the balance of the railroad safety laws has been delegated to the FRA Administrator under 49 CFR 1.89.

2. Summary of Significant Issues Raised by Public Comments, Summary of Assessment of Such Issues, and Statement of Any Changes in Rule as Result of Such Comments

There is an extensive section, above, discussing comments. This section discusses comments particularly applicable to small railroads.

ISP Determination: ASLRRA expressed concern that FRA’s proposed methodology for identifying ISP railroads would select a disproportionate number of the smallest railroads. To assess this concern, FRA conducted several analyses of data from FRA’s RAIRS, the system that would provide FRA data for the inadequate safety performance methodology. To approximate the proposed methodology, FRA conducted the analyses for the three-year period from 2012 through 2014, the latest years for which a full 12 months’ data were available at the time of the analysis.

The first analysis identified and evaluated all railroads the proposed methodology would analyze for inadequate safety performance (i.e., Class II and III freight railroads

that operate on the general system). On average, these railroads reported about 231,000 total train miles operated and 200,000 employee hours between 2012 and 2014.

FRA then used the proposed methodology for identifying ISP railroads to evaluate Class II and III railroads for inadequate safety performance. Railroads determined to have inadequate safety performance reported, on average, 32,000 total train miles operated and 35,000 employee hours between 2012 and 2014. These averages are substantially lower than averages for the entire pool of Class II and III railroads the proposed methodology would evaluate. Based on this result, FRA shares ASLRRA's concern that the proposed methodology would over-select the smallest railroads.

FRA has therefore changed the proposed methodology to include a preliminary selection in the quantitative analysis phase. This preliminary selection will help avoid over-selecting the smallest railroads by utilizing the absolute number (rather than rates) of two factors regarding a railroad's safety performance. FRA has applied this methodology to RAIRS data. On average, railroads identified as having inadequate safety performance reported 146,000 train miles operated and 165,000 employee hours from 2012 through 2014. These averages are much closer to the averages for the entire pool of Class II and III freight railroads that the methodology will initially evaluate.

Appeal of FRA's ISP Determination: AAR/ASLRRA commented urging FRA to establish an appeals process for railroads that the methodology identifies as having inadequate safety performance. FRA agrees including an appeals process for railroads determined to have inadequate safety performance is fair. In the final rule, FRA therefore added a process for railroads to petition the FRA Administrator for reconsideration of inadequate safety performance determinations under existing procedures to appeal to the

Administrator (e.g., procedures regarding petitions for waiver of safety rules under 49 CFR part 211, subpart C). These procedures are well-established and should be familiar to the railroad industry.

Information Protection: While small railroad commenters favored information protection, FRA received several comments arguing the proposed information protections are too narrow. ASLRRA commented FRA improperly relied on section 409 and the Supreme Court's decision in *Guillen*, and therefore FRA is not protecting data as Congress intended in the RSIA. ASLRRA also questions FRA's explanation in the NPRM preamble that the information protections would only extend to the Short Line Safety Institute (Institute) if FRA finds the Institute is part of a complete RRP program. *See* 80 FR 10964 (Feb. 27, 2015). As Section V.A.8 explains above, FRA disagrees with these comments and believes it has properly limited the scope of the information protections, the protections are consistent with Congress' intent in the RSIA, and FRA lacks authority under RSIA to extend information protections to programs that do not fully meet the requirements of this RRP final rule.

AAR/ASLRRA also commented on the NPRM preamble statement that § 271.11 would only protect information once FRA approves a railroad's RRP plan. They believe that approach does not make sense and weakens the rule's proposed protections. As Section V.A.8 explains above, FRA agrees with AAR/ASLRRA and does not intend to limit the information protections only to information a railroad compiles or collects for an RRP plan FRA has already approved.

Performance-based rule and flexibility: As Section V.B.2 explains above, the NPRM described RRP as a performance-based rule that would not establish prescriptive

requirements that may be appropriate for one railroad but unworkable for another.

Several commenters supported FRA's decision to propose a performance-based, flexible RRP rule, and AAR/ASLRRA acknowledged the performance-based nature of RRP. The performance-based nature of the RRP final rule gives a smaller railroad the flexibility to tailor the rule's requirements to its specific operations and amount of resources.

Short Line Safety Institute: As Section V.B.8 explains above, ASLRRA commented that small railroad participation in the Institute should suffice as complete compliance with the requirements in the NPRM. ASLRRA also claims FRA would fulfill the SBREFA requirement to grant special considerations to small businesses by accepting participation in the Institute as satisfying RRP requirements. FRA currently cannot determine, however, whether the Institute will fully comply with the RSIA mandate or the requirements of this final rule. Rather, FRA believes it is more appropriate to make this determination when reviewing RRP plans under § 271.301 of the final rule. FRA also notes that the final rule will not unduly burden short line and regional railroads because of its scalability and flexibility.

3. The Response of the Agency to Any Comments Filed by the Chief Counsel for Advocacy of the Small Business Administration

FRA did not receive any comments from the Chief Counsel for Advocacy of the Small Business Administration.

4. Description and Estimate of Number of Small Entities to Which the Final Rule Applies

"Small entity" is defined in 5 U.S.C. 601 as a small business concern that is independently owned and operated, and is not dominant in its field of operation. The U.S. Small Business Administration (SBA) has authority to regulate issues related to

small businesses, and stipulates in its size standards that a “small entity” in the railroad industry is a for profit “line-haul railroad” that has fewer than 1,500 employees, a “short line railroad” with fewer than 500 employees, or a “commuter rail system” with annual receipts of less than 15 million dollars. *See* “Size Eligibility Provisions and Standards,” 13 CFR part 121, subpart A. Additionally, 5 U.S.C. 601(5) defines as “small entities” governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000.

Federal agencies may adopt their own size standards for small entities in consultation with SBA and in conjunction with public comment. Under that authority, FRA published a final statement of agency policy formally establishing “small entities” or “small businesses” as railroads, contractors, and hazardous materials shippers that meet the revenue requirements of a Class III railroad under 49 CFR 1201.1-1, which is \$20 million or less in inflation-adjusted annual revenues, and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less. *See* 68 FR 24891 (May 9, 2003) (codified at 49 CFR part 209, appendix C). The \$20 million limit is based on the STB’s revenue threshold for a Class III railroad carrier. Railroad revenue is adjusted for inflation by applying a revenue deflator formula in accordance with 49 CFR 1201.1-1. FRA is using this definition for the final rule. For other entities, the same dollar limit in revenues governs whether a railroad, contractor, or other respondent is a small entity.

Railroads

In the universe of railroads that potentially have to comply with the final rule, there are 7 Class I railroads, 11 Class II railroads (1 of which is classified as a passenger

railroad that will be excepted from the final rule), and 735 Class III freight railroads. Out of the 735 Class III freight railroads, the final rule excepts railroads not on the general system and tourist railroads, leaving approximately 600 Class III railroads as small entities that may be subject to the requirements of the final rule.³¹

To identify Class II and Class III railroads that must comply with the final rule because they demonstrate inadequate safety performance, FRA will annually conduct a two-phase analysis. The first phase is a statistically-based quantitative analysis of fatalities, FRA-reportable injuries/illnesses, FRA-reportable accidents/incidents, and FRA safety violations; and the second phase is a qualitative assessment that includes input from affected railroads and their employees. *See* § 271.13 of the final rule for a full description of FRA's process for determining inadequate safety performance.

Because FRA's initial inadequate safety performance analysis will occur at least one year after the RRP final rule goes into effect, it is impossible for FRA to know how many Class III railroads will be required to comply. FRA reviewed a 3-year rolling average of safety data to test the selection process. This analysis accounted for the types of information that railroads and employees could present to FRA during the qualitative review process. Such information could serve to refute the quantitative analysis' identification of a railroad as demonstrating inadequate safety performance. Based on this analysis, FRA expects to identify approximately 10 Class II and Class III freight railroads that demonstrate inadequate safety performance in year 2 of the 10-year period of the analysis. In each subsequent year, FRA expects to identify five additional ISP railroads. Therefore, by year 10, FRA will have identified approximately 50 ISP

³¹ Total number of Class III railroads potentially impacted = 735 Class III railroads – 43 Class III railroads not on the general system – 93 Class III railroads that are tourist railroads = 599 Class III railroads.

railroads.

FRA expects the number of ISP railroads will reach a maximum of 50 railroads by year 10, at which point the number of ISP railroads should flatten out or decline. In estimating the maximum number of ISP railroads, FRA considered the following factors: (1) industry-wide safety performance improvement; (2) in year 7 of the analysis, some ISP railroads will seek and receive relief from being in the program after complying for 5 years; (3) the size of the railroad pool being examined for inadequate safety performance would shrink as more railroads are required to comply with part 271; and (4) those railroads not identified as being an ISP railroad will observe the positive behaviors and results of ISP railroads and will embrace the better safety practices without having a formal RRP program.

For purposes of this FRFA, FRA expects that each ISP will be a Class III railroad (small railroad).

Contractors

Some railroads use contractors to perform many different functions on their railroads. For some of these railroads, contractors perform safety-related functions, such as operating trains. For assessing the impact of an RRP, contractors fall into two groups: larger contractors that perform a primary operating or maintenance function for the railroads, and smaller contractors that perform ancillary functions to the primary operations. Larger contractors are typically employed by sizable private companies or part of an international conglomerate. Smaller contractors may perform such duties as brush clearing or painting facilities.

Safety-related policies, work rules, guidelines, and regulations are imparted to the

small contractors today as part of their contractual obligations and qualification to work on the Class I freight railroads, and potentially to work for ISP railroads. FRA sees minimal additional burden to imparting the same type of information under each railroad's RRP. A very small administrative burden may result.

Under the final rule, contractors (small or large) that provide significant safety-related services are expected to have minimal burden under the rule. For example, while the final rule requires the railroad to involve the persons that provide significant safety-related services in the railroad's RRP, it doesn't require the entity to do any training. Thus, any burden imposed on contractors would be indirect or considered in the contract with the pertinent railroad or both.

5. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including Estimate of Small Entities Regulated by Rule

The rule will require an ISP railroad to develop and implement an RRP under a written RRP plan FRA has reviewed and approved. There are several reporting, recordkeeping, and compliance costs associated with the final rule. FRA believes that the added burden of recordkeeping is marginal due to the final rule requirements.

The total 10-year cost of this final rule is \$40.2 million (PV, 7%) and \$51.0 million (PV, 3%), of which FRA estimates \$3.6 million (PV, 7%) and \$4.5 million (PV, 3%) or less will be attributable to small entities. Based on FRA's RIA, which has been placed in the docket, the average Class III ISP railroad will incur an average burden per year. If, for example, ISP railroads comply with the final rule for an average of eight years, then the total cost will be approximately \$143,000 (PV, 7%) and \$168,000 (PV, 3%) per ISP railroad.

However, due to the small number of small railroads that are estimated to be impacted by this final rule, the cost per railroad could be found to be significant. For a thorough presentation of cost estimates, please refer to the RIA, which has been placed in the docket for this rulemaking.

The following section outlines the potential additional burden on small railroads for each subpart of the final rule.

- *Subpart A—General*

The policy, purpose, and definitions outlined in subpart A, alone, will not impose a significant burden on small railroads. However, there is the small requirement for notifying employees of the railroad that FRA's quantitative analysis has found that the railroad may demonstrate inadequate safety performance. This subpart of the final rule will impose less than 1 percent of the total burden for small entities.

- *Subpart B—Risk Reduction Program Requirements*

Subpart B of the final rule will have a proportional effect directly related to the size and complexity of a railroad and will impose approximately 60 percent of the total burden for small entities. Generally, this subpart describes what a railroad must develop and include in its RRP. For example, it requires the development of a risk-based HMP (which includes a risk-based hazard analysis and the design and implementation of mitigation strategies), safety performance evaluation, and technology implementation plans.

Because of the scalable nature of the final rule, the requirements of an RRP will be much less complex for a small railroad than they will be for a Class I railroad. Additionally, several characteristics of small railroads should also limit the number and

types of hazards for the RRP to address. These characteristics include the concentrated geography of operation in a small area, the short distance of operation, and a non-fragmented and non-diffused work force (in other words, most employees of a small railroad are in one place). RRP requirements such as technology implementation plans should also not be burdensome. This is because small railroads are very limited in the resources they can allocate for new technologies. FRA expects that small railroads will rely on tried-and-true technologies that have been thoroughly tested elsewhere.

- *Subpart C—Risk Reduction Program Plan Requirements*

Subpart C of the final rule will have a proportional effect directly related to the size and complexity of a railroad. This subpart of the final rule contains the requirements for RRP plans and will impose approximately 29 percent of the total burden for small entities. For example, it requires a plan statement on each RRP element mandated in subpart B and plan statements related to safety policy and goals, a system description, the consultation process, and an RRP implementation plan. This subpart of the final rule is primarily the paperwork or written plan that supports the processes and programs in the RRP.

- *Subpart D—Review, Approval, and Retention of Risk Reduction Program Plans*

Subpart D of the final rule will impose less than 1 percent of the total burden for small entities. The final requirements of this subpart are for the submission to FRA for review and approval of the initial RRP plan and any amendments thereto. Since only 10 small railroads are expected to submit RRP plans for approval in year two, and approximately 5 small railroads are expected to submit RRP plans each year thereafter, this subpart should have a very small economic impact.

- *Subpart E—Internal Assessments*

Subpart E of the final rule will impose approximately 9 percent of the total burden for small entities. This burden is for the ongoing cost of small railroads to perform an internal assessment and report on internal audits on an annual basis. As noted above, initially very few small railroads will be performing these internal assessments, which will serve to minimize the economic impact on small railroads.

- *Subpart F—External Audits*

Subpart F of the final rule will impose approximately 1 percent of the total burden for small entities. This burden is for the ongoing cost of small railroads to host an external audit by FRA or its designees on a periodic basis. This includes the burden to produce an improvement plan addressing any instances of deficiencies or noncompliance FRA identified during the audit. FRA does not expect more than five of these small railroads to receive an external audit in any given year.

Market and Competition Considerations

The railroad industry has several significant barriers to entry, such as the need to own or otherwise obtain access to rights-of-way and the high capital expenditure needed to purchase a fleet, as well as track and equipment. Furthermore, the small railroads under consideration will potentially be competing only with the trucking industry and typically deal with the transport of commodities or goods that are not truck-friendly. Thus, while this final rule will have an economic impact on Class I freight railroads and ISP railroads, it should not have an impact on the competitive position of small railroads.

For the entire railroad industry over a 10-year period, FRA estimates the total cost

for the rule will be \$40.2 million (PV, 7-percent), or \$51.0 million (PV, 3-percent).³²

Based on information currently available, FRA estimates that Class II and Class III railroads will bear 9 percent of the total railroad costs associated with implementing the rule.

6. Description of Steps Taken to Minimize Significant Adverse Economic Impact on Small Entities

As discussed above, FRA estimates ISP railroads will incur approximately 9 percent of the total cost of this final rule. Based on FRA's RIA, the average ISP railroad will incur an average burden of approximately \$18,000 (PV, 7-percent) and \$21,000 (PV, 3-percent) per year. If ISP railroads complied with the RRP final rule for an average of eight years, then the average total cost will be approximately \$144,000 (PV, 7-percent) and \$168,000 (PV, 3-percent) per ISP railroad.

FRA has taken several steps to minimize the final rule's burden on small entities. For example, several provisions in the final rule respond directly to comments on the NPRM raising small entity concerns. Specifically, FRA modified the methodology for identifying ISP railroads to avoid over-selecting the smallest railroads and included a process in the final rule allowing railroads to appeal an ISP determination to the FRA Administrator. Additional steps FRA has taken include developing and promulgating a performance-based final rule, helping to create the Institute (which will help any small railroad comply with this rule), and providing information protections.

FRA also intends to aid railroads, including small entities, in the development of the RRP, starting at the planning phase and continuing through the implementation

³² FRA's estimates follow Office of Management and Budget (OMB) guidance in OMB Circular A-94 to use real discount rates of 7- and 3-percent for regulatory analysis.

phase. The final rule is also scalable by design. Therefore, a short line or regional railroad can likely maintain full compliance with the final rule with an RRP that is not likely to have the complexity and comprehensiveness of an RRP for a larger railroad. FRA will aid railroads so that the scope and content of their RRP's are proportionate to their size and the nature of their operation. All these actions benefit small railroads and will help them comply with the final rule. Lastly, as a result of addressing the safety issues that led FRA to determine the railroad demonstrated inadequate safety performance, FRA believes an RRP will help an ISP railroad more effectively allocate resources, while also reducing the frequency of accidents. For small entities, FRA estimates the monetized value of gains will be equal to or greater than the final rule's burden.

In the *Initial Regulatory Flexibility Analysis*, FRA stated it had not determined whether the proposed rule would have a significant economic impact on a substantial number of small entities. *See* 80 FR 10982 (Feb. 27, 2015). FRA remains uncertain whether the rule may have a significant impact on affected entities, or whether the number of small entities FRA expects to be impacted, a maximum of 50 out of approximately 600, is a substantial number of small entities. Therefore, FRA is not certifying that the rule will not have a significant impact on a substantial number of small entities.

In compliance with SBREFA, FRA is developing a compliance guide to assist small entities in complying with the rule. FRA is placing this guide in the public docket for this rulemaking.

Overall, FRA has taken reasonable measures to ensure the rule's impact is commensurate with business size, and FRA will aid small railroad compliance.

C. Federalism

Executive Order 13132, "Federalism" (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal Government provides the funds necessary to pay the direct compliance costs incurred by State and local governments or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

FRA analyzed this final rule under the principles and criteria in Executive Order 13132. FRA has determined this rule does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. In addition, FRA has determined this rule does not impose substantial direct compliance

costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

This rule adds part 271, Risk Reduction Program. FRA notes that this part could have preemptive effect by the operation of law under a provision of the former Federal Railroad Safety Act of 1970, repealed and re-codified at 49 U.S.C. 20106 (section 20106). Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the “essentially local safety or security hazard” exception to section 20106. FRA has determined that certain State laws may be preempted by this part. Section 271.11(d) in the final rule specifically addresses the preemption of State discovery rules and sunshine laws to the extent those laws would require disclosure of information protected by § 271.11 in a Federal or State court proceeding for damages involving personal injury, wrongful death, or property damage. The preemption of State discovery rules and sunshine laws is discussed further in the section-by-section analysis of § 271.11(d). In addition, as previously discussed, section 20119(b) authorizes FRA to issue a rule governing the discovery and use of risk analysis information in litigation.

In sum, FRA has analyzed this rule under the principles and criteria in Executive Order 13132. As explained above, FRA has determined this rule has minimal federalism implications. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this rule is not required.

D. International Trade Impact Assessment

The Trade Agreements Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The act requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. This rule is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

E. Paperwork Reduction Act

FRA is submitting the information collection requirements in this rule to the Office of Management and Budget (OMB) for approval under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections that contain information collection requirements are duly designated and the estimated time to fulfill each requirement is as follows:

CFR Section/Subject ³³	Respondent Universe	Total Annual Responses	Average Time per Response	Total Annual Burden Hours	Total Annual Dollar Cost Equivalent ³⁴
271.13 – Determination of inadequate safety performance (ISP) – Notice to employees of possible ISP identification by FRA	15 railroads	5 notices	3 hours	15 hours	\$1,018

³³ Information collection requests relating to petitions and audits will occur outside of this information collection request timeframe. Also, because § 271.113 requires a railroad to involve directly affected employees in establishing or implementing an RRP (e.g., when identifying hazards, conducting internal assessments, or otherwise performing activities required under part 271), the burdens associated with § 271.113 are covered under the other burdens associated with subparts B and E of part 271.

³⁴ The dollar equivalent cost is derived from the Surface Transportation Board's Full Year Wage A&B data series using the appropriate employee group hourly wage rate that includes 75-percent overhead charges.

-- Employee confidential comments to FRA regarding RR possible ISP identification	125 employees	5 comments	30 minutes	2.5 hours	\$170
-- RR Documentation to FRA refuting possible ISP identification	15 railroads	5 documents	8 hours	40 hours	\$2,715
271.101(a) – Risk Reduction Programs (RRPs) – Class I railroads	This burden is covered under sections 271.103, 271.105, 271.107, 271.109, and 271.111.				
271.103 – RRP hazard management program (HMPs)	7 railroads	2,333 HMPs analyses	3,360 hours	7,839 hours	\$532,111
271.105 – RRP safety performance evaluation (SPEs): survey/evaluation	7 railroads	2,333 SPEs evaluation	147 hours	343 hours	\$23,283
	7 railroads	2,333 assessments	1,060 hours	2,473 hours	\$167,867
271.107 – Safety Outreach – communications/reports	7 railroads	44,333 communications	1 hour	44,333 hours	\$2,379,352
	7 railroads	28 communications	30 minutes	14 hours	\$950
271.109 – Technology analysis and technology implementation plans	7 railroads	2,333 reports	10 hours	23.3 hours	\$1,582
271.111 – RRP implementation training – programs/tr. employees/rcds.	7 railroads	1,400 records of trained employees	3 minutes	70 hours	\$4,752
271.101(c) -- Communication by Class I RRs that host passenger train service with RRs subject to FRA System Safety Program Requirements	7 railroads	40 communications/consultations	2 hours	80 hours	\$5,430
-- (d) -- Identification/ communication w/entities performing/utilizing significant safety-related services – Class I RRs	7 railroads	212 communications/consultations	1 hour	212 hours	\$14,391
-- RR Identification/ further communication with contractors performing/utilizing	7 railroads	1,488 communications/consultations	1 hour	1,488 hours	\$101,005

significant safety related services – Class I RRs					
271.101(a) – Risk Reduction Programs (RRPs) – ISP railroads	This burden is covered under sections 271.103, 271.105, 271.107, 271.109, and 271.111.				
271.103 – RRP hazard management program (HMPs)	15 railroads	5 HMPs	240 hours	1,200 hours	\$81,456
271.105 – RRP safety performance evaluation (SPEs): survey/evaluation	15 railroads	5 surveys	14.73 hours	74 hours	\$5,023
	15 railroads	5 SPEs	51.1 hours	256 hours	\$17,377
271.107 – Safety Outreach – communications/reports	15 railroads	5 communications	1 hour	5 hours	\$268
	15 railroads	5 reports	3 hours	15 hours	\$1,018
271.109 – Technology analysis and technology implementation plans	15 railroads	5 plans	5 hours	25 hours	\$1,697
271.111 – RRP implementation training – programs/tr. employees/rcds.	15 railroads	50 records of trained employees	3 minutes	2.5 hours	\$170
271.101(d) – ISPs -- Identification/communication w/entities performing significant safety-related services	15 railroads	5 communications/consultations	2 hours	10 hours	\$679
271.201/203 – Written risk reduction program plans (RRP plans) – Adoption and implementation of RRP plans – Class I	7 railroads	2.333 RRP plans	461 hours	1,075 hours	\$72,971
-- Written RRP plans – ISP RRs	15 railroads	5 RRP plans	96 hours	480 hours	\$32,582
271.207 – RR Good faith consultation w/directly affected employees - Class I RRs	7 railroads	2.333 consults	8 hours	19 hours	\$1,290

-- RR Notification to non-represented employees of consultation meeting – Class I RRs	7 railroads	1 notification	3 hours	3 hours	\$204
-- RR Good faith consultations/notices: ISP RRs	15 railroads	5 consults/notices	20 hours	100 hours	\$6,788
(d) – Submission of detailed consultation statement along w/RRP plan by Class I RRs	7 railroads	2,333 consultation statements	200 hours	467 hours	\$31,700
– Submission of detailed consultation statement along w/RRP plan by ISPs	15 railroads	5 consultation statements	40 hours	200 hours	\$13,576
-- Copy of RRP plan/consultation statement to service list individuals – Class I RRs + ISP RRs	22 railroads	380 plan copies	2 minutes	12.7 hours	\$862
	22 railroads	380 consultation statements	2 minutes	12.7 hours	\$862
-- Statements from directly affected employees – Class I RRs	10 labor organizations	3 statements	6 hours	18 hours	\$1,222
-- Statements from directly affected employees – ISP RRs	15 railroads	12 statements	1 hour	12 hours	\$815
271.301 – Filing of RRP plan w/FRA - Class I RRs	7 railroads	2,333 filed plans	2 hours	5 hours	\$339
-- Filing of RRP plan w/FRA – ISP RRs	15 railroads	5 filed plans	2 hours	10 hours	\$679
-- Class I RR corrected RRP plan	7 railroads	1 RRP plan	2 hours	2 hours	\$136
-- FRA requested Class I RR consultation with directly affected employees regarding substantive corrections/changes to RRP plan	7 railroads	1 consult/statement	3 hours	3 hours	\$204
-- ISP RR corrected RRP plan	15 railroads	1 RRP plan	2 hours	2 hours	\$136
-- FRA requested ISP RR further consultation with directly affected employees regarding substantive	15 railroads	1 consult/statement	1 hour	1 hour	\$68

amendment to RRP plan					
271.303 – Amendments consultation w/directly affected employees on substantive amendments to RRP plan – Class I RRs and ISP RRs	22 railroads (Class I + ISP)	2 consults	1 hour	2 hours	\$136
-- Employee statement to FRA on RR RRP plan substantive amendment where agreement could not be reached	22 railroads (Class I + ISP)	2 employee statements	30 minutes	1 hour	\$68
-- Filed amended RRP plan - Class I RRs	7 railroads	1 plan	6 hours	6 hours	\$407
-- Filed amended RRP plan - ISP RRs	15 railroads	1 plan	1 hour	1 hour	\$68
271.307 – Retention of RRP plans – Copies of RRP Plan/Amendments by RR at system/division headquarters -- Class I and ISP RRs	22 railroads (Class I + ISP)	22 plan copies	10 minutes	4 hours	\$272
217.401/403 – Annual internal assessment/improvement plans – Class I RRs	7 railroads	2,333 assessments/ improvement plans	120 hours	280 hours	\$19,006
-- Annual internal assessment/improvement plans – ISP RRs	15 railroads	5 assessments/ improvement plans	32 hours	160 hours	\$10,861
271.405 – Internal assessment report copy to FRA – Class I RRs	7 railroads	2,333 reports	8 hours	19 hours	\$1,290
-- Internal assessment report copy to FRA – ISP RRs	15 railroads	5 reports	2 hours	10 hours	\$679
Appendix B – Request by FRA for additional information/documents to determine whether railroad has met good faith and best efforts consultation requirements of section 271.207	7 railroads	3 documents	40 hours	120 hours	\$8,146

-- Further railroad consultation w/employees after determination by FRA that railroad did not use good faith/best efforts	7 railroads	1 consult	8 hours	8 hours	\$543
-- Meeting to discuss administrative details of consultation process during the time between initial meeting and applicability date – Class I RRs	7 railroads	7 meetings/consults	2 hours	14 hours	\$950
-- Meeting to discuss administrative details of consultation process during the time between initial meeting and applicability date – ISP RRs	15 railroads	7 meetings/consults	1 hour	7 hours	\$475
-- Notification to non-represented employees of good faith consultation process –ISP RRs	15 railroads	600 notices	15 minutes	150 hours	\$10,182
-- Draft RRP plan proposal to employees – ISP RRs	15 railroads	20 proposals/copies	2 hours	40 hours	\$2,715
-- Employee comments on RRP plan draft proposal	2,000 employees	60 comments	1 hour	60 hours	\$4,073
Totals	22 railroads	49,148 responses	N/A	61,825 hours	\$3,566,619

All estimates include the time for reviewing instructions, searching existing data sources, gathering or maintaining the needed data, and reviewing the information.

For information or a copy of the paperwork package submitted to OMB, contact Ms. Hodan Wells, Information Collection Clearance Officer, Office of Railroad Safety, Federal Railroad Administration, at 202-493-0440 or Ms. Kimberly Toone, Information Collection Clearance Officer, Office of Information Technology, Federal Railroad Administration, at 202-493-6132.

Organizations and individuals desiring to submit comments on the collection of

information requirements should direct them to Ms. Hodan Wells or Ms. Kimberly Toone, Federal Railroad Administration, 1200 New Jersey Avenue, SE, 3rd Floor, Washington, DC 20590. Comments may also be submitted via e-mail to Ms. Wells at *Hodan.Wells@dot.gov* or Ms. Toone at *Kim.Toone@dot.gov*.

OMB must make a decision concerning the collection of information requirements contained in this rule between 30 and 60 days after publication of this document in the *Federal Register*. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. FRA did not receive any OMB or public comments on the information collection requirements contained in the NPRM.

FRA is not authorized to impose a penalty on persons for violating information collection requirements that do not display a current OMB control number, if required. The current OMB control number is 2130-0610.

F. Environmental Assessment

FRA has evaluated this rule under its “Procedures for Considering Environmental Impacts” (FRA’s Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined this rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA’s Procedures. 64 FR 28547, 28548.

Consistent with section 4(c) and (e) of FRA’s Procedures, FRA also concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds this rule is not a major Federal action significantly affecting the quality of the human environment.

G. Unfunded Mandates Reform Act of 1995

Under section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 2 U.S.C. 1531), each Federal agency “shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).” Section 202 of the Act (2 U.S.C. 1532) further requires each agency to prepare a comprehensive written statement for any proposed or final rule that includes a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any 1 year.³⁵

This final rule will not result in such an expenditure, and thus preparation of such a statement is not required.

H. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.” 66 FR 28355 (May 22, 2001). FRA evaluated this final rule in accordance with Executive Order 13211, and determined that

³⁵ See U.S. Department of Transportation, “Guidance – Threshold of Significant Regulatory Actions under the Unfunded Mandates Reform Act of 1995,” April 4, 2016, <https://www.transportation.gov/office-policy/transportation-policy/threshold-significant-regulatory-actions-under-unfunded-mandat-0>, as accessed July 26, 2018.

this regulatory action is not a “significant energy action” within the meaning of the Executive Order.

Executive Order 13783, “Promoting Energy Independence and Economic Growth,” requires Federal agencies to review regulations to determine whether they potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources. *See* 82 FR 16093 (Mar. 31, 2017). FRA determined this final rule will not burden the development or use of domestically produced energy sources. Under the Executive Order, a “significant energy action” is defined as any action by an agency (normally published in the *Federal Register*) that promulgates, or is expected to lead to the promulgation of, a final rule or regulation (including a notice of inquiry, advance notice of proposed rulemaking, and notice of proposed rulemaking) that (1)(i) is a significant regulatory action under EO 12866 or any successor order and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this rule under Executive Order 13211 and determined this rule will not have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a “significant energy action” under the Executive Order 13211.

List of Subjects in 49 CFR Part 271

Penalties, Railroad safety, Reporting and recordkeeping requirements, Risk reduction.

The Rule

In consideration of the foregoing, FRA adds part 271 to chapter II, subtitle B of title 49, Code of Federal Regulations, to read as follows:

PART 271—RISK REDUCTION PROGRAM

Subpart A—General

Sec.

271.1 Purpose and scope.

271.3 Application.

271.5 Definitions.

271.7 [Reserved]

271.9 Penalties and responsibility for compliance.

271.11 Discovery and admission as evidence of certain information.

271.13 Determination of inadequate safety performance.

271.15 Voluntary compliance.

Subpart B—Risk Reduction Program Requirements

271.101 Risk reduction programs.

271.103 Risk-based hazard management program.

271.105 Safety performance evaluation.

271.107 Safety outreach.

271.109 Technology analysis and technology implementation plan.

271.111 Implementation and support training.

271.113 Involvement of railroad employees.

Subpart C—Risk Reduction Program Plan Requirements

271.201 General.

271.203 Policy, purpose and scope, and goals.

271.205 System description.

271.207 Consultation requirements.

271.209 Consultation on amendments.

271.211 Risk-based hazard management program process.

271.213 Safety performance evaluation process.

271.215 Safety outreach process.

271.217 Technology implementation plan process.

271.219 Implementation and support training plan.

271.221 Involvement of railroad employees process.

271.223 Internal assessment process.

271.225 RRP implementation plan.

Subpart D—Review, Approval, and Retention of Risk Reduction Program Plans

271.301 Filing and approval.

271.303 Amendments.

271.305 Reopened review.

271.307 Retention of RRP plans.

Subpart E—Internal Assessments

271.401 Annual internal assessments.

271.403 Internal assessment improvement plans.

271.405 Internal assessment reports.

Subpart F—External Audits

271.501 External audits.

271.503 External audit improvement plans.

Appendix A to Part 271—Federal Railroad Administration Guidance on the Risk Reduction Program Consultation Process

Appendix B to Part 271—Procedures for Submission of RRP Plans and Statements from Directly Affected Employees

Authority: 49 U.S.C. 20103, 20106-20107, 20118-20119, 20156, 21301, 21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.89.

Subpart A—General**§ 271.1 Purpose and scope.**

(a) The purpose of this part is to improve railroad safety through structured, proactive processes and procedures developed and implemented by railroads. Each railroad subject to this part must establish a Risk Reduction Program (RRP) that systematically evaluates railroad safety hazards on its system and manages the risks associated with those hazards to reduce the number and rates of railroad accidents/incidents, injuries, and fatalities.

(b) This part prescribes minimum Federal safety standards for the preparation, adoption, and implementation of RRP. This part does not restrict railroads from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

(c) This part prescribes the protection of information a railroad compiles or collects solely for the purpose of planning, implementing, or evaluating an RRP under

this part.

(d) This part does not require an RRP to address hazards completely unrelated to railroad safety and that fall under the exclusive jurisdiction of another Federal agency. Additionally, an RRP required by this part is not intended to address and should not address the safety of employees while performing inspections, tests, and maintenance, except where FRA has already addressed workplace safety issues, such as blue signal protection in part 218 of this chapter. FRA does not intend to approve any specific portion of an RRP plan that relates exclusively to employee working conditions.

§ 271.3 Application.

(a) Except as provided in paragraph (b) of this section, this part applies to—

(1) Class I railroads;

(2) Railroads determined to have inadequate safety performance pursuant to § 271.13; and

(3) Railroads that voluntarily comply with the requirements of this part pursuant to § 271.15.

(b) This part does not apply to:

(1) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation;

(2) Tourist, scenic, historic, or excursion operations, whether on or off the general railroad system of transportation;

(3) Operation of private cars, including business/office cars and circus trains;

(4) Railroads that operate only on track inside an installation that is not part of the general railroad system of transportation (i.e., plant railroads, as defined in § 271.5);

and

(5) Commuter or intercity passenger railroads that are subject to Federal system safety program requirements contained in part 270 of this chapter.

(c) If a railroad contracts out significant portions of its operations, the contractor and the contractor's employees performing the railroad's operations shall be considered directly affected employees for purposes of this part.

§ 271.5 Definitions.

As used in this part only—

Accident/incident means an “accident/incident” as defined in § 225.5 of this chapter.

Administrator means the Administrator of the Federal Railroad Administration or the Administrator's delegate.

FRA means the Federal Railroad Administration.

FRA Associate Administrator means the Associate Administrator for Railroad Safety and Chief Safety Officer, Federal Railroad Administration, or the Associate Administrator's delegate.

Fully implemented means that all elements of an RRP as described in the RRP plan are established and applied to the safety management of the railroad.

Hazard means any real or potential condition that can cause injury, illness, or death; damage to or loss of a system, equipment, or property; or damage to the environment.

Inadequate safety performance means safety performance that FRA has determined to be inadequate based on the criteria described in § 271.13.

Mitigation strategy means an action or program intended to reduce or eliminate the risk associated with a hazard.

Person means an entity of any type covered under 1 U.S.C. 1, including, but not limited to, the following: A railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor or subcontractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor or subcontractor.

Pilot project means a limited scope project used to determine whether quantitative evaluation and analysis suggests that a particular system or mitigation strategy has potential to succeed on a full-scale basis.

Plant railroad means a plant or installation that owns or leases a locomotive, uses that locomotive to switch cars throughout the plant or installation, and is moving goods solely for use in the facility's own industrial processes. The plant or installation could include track immediately adjacent to the plant or installation if the plant railroad leases the track from the general system railroad and the lease provides for (and actual practice entails) the exclusive use of that trackage by the plant railroad and the general system railroad for purposes of moving only cars shipped to or from the plant. A plant or installation that operates a locomotive to switch or move cars for other entities, even if solely within the confines of the plant or installation, rather than for its own purposes or industrial processes, is not considered a plant railroad because the performance of such activity makes the operation part of the general railroad system of transportation.

Positive train control system means a system designed to prevent train-to-train

collisions, overspeed derailments, incursions into established work zone limits, and the movement of a train through a switch left in the wrong position, as described in subpart I of part 236 of this chapter.

Railroad means:

(1) Any form of non-highway ground transportation that runs on rails or electromagnetic guideways, including:

(i) Commuter or other short-haul rail passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and

(ii) High speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads, but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation; and

(2) A person or organization that provides railroad transportation, whether directly or by contracting out operation of the railroad to another person.

Risk means the combination of the probability (or frequency of occurrence) and the consequence (or severity) of a hazard.

Risk-based HMP means a risk-based hazard management program (HMP).

Risk reduction means the formal, top-down, organization-wide approach to managing safety risk and assuring the effectiveness of safety risk mitigation strategies. It includes systematic procedures, practices, and policies for the management of safety risk.

RRP means a Risk Reduction Program.

RRP plan means a Risk Reduction Program plan.

Safety culture means the shared values, actions, and behaviors that demonstrate a commitment to safety over competing goals and demands.

Safety performance means a realized or actual safety accomplishment relative to stated safety objectives.

Safety outreach means the communication of safety information to support the implementation of an RRP throughout a railroad.

Senior management means personnel at the highest level of a railroad's management who are responsible for making major policy decisions and long-term business plans regarding the operation of the railroad.

STB means the Surface Transportation Board of the United States.

Tourist, scenic, historic, or excursion operations means railroad operations that carry passengers, often using antiquated equipment, with the conveyance of the passengers to a particular destination not being the principal purpose. Train movements of new passenger equipment for demonstration purposes are not tourist, scenic, historic, or excursion operations.

§ 271.7 [Reserved]

§ 271.9 Penalties and responsibility for compliance.

(a) Any person that violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least the minimum civil monetary penalty and not more than the ordinary maximum civil monetary penalty per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to individuals, or has caused death or

injury, a penalty not to exceed the aggravated maximum civil monetary penalty per violation may be assessed. *See* 49 CFR part 209, appendix A. Each day a violation continues shall constitute a separate offense. Any person that knowingly and willfully falsifies a record or report required by this part may be subject to criminal penalties under 49 U.S.C. 21311. See FRA’s website at www.fra.dot.gov for a statement of agency civil penalty policy.

(b) Although the requirements of this part are stated in terms of the duty of a railroad, when any person, including a contractor or subcontractor to a railroad, performs any function covered by this part, that person (whether or not a railroad) shall perform that function in accordance with this part.

§ 271.11 Discovery and admission as evidence of certain information.

(a) *Protected information.* Any information compiled or collected after [INSERT DATE 365 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**] solely for the purpose of planning, implementing, or evaluating a risk reduction program under this part shall not be subject to discovery, admitted into evidence, or considered for other purposes in a Federal or State court proceeding for damages involving personal injury, wrongful death, or property damage. For purposes of this section—

(1) “Information” includes plans, reports, documents, surveys, schedules, lists, or data, and specifically includes a railroad’s analysis of its safety risks under § 271.103(b) and a railroad’s statement of mitigation measures under § 271.103(c); and

(2) “Solely” means that a railroad originally compiled or collected the information for the exclusive purpose of planning, implementing, or evaluating a risk

reduction program under this part. Information compiled or collected for any other purpose is not protected, even if the railroad also uses that information for a risk reduction program. “Solely” also means a railroad continues to use that information only for its risk reduction program. If a railroad subsequently uses for any other purpose information that was initially compiled or collected for a risk reduction program, this section does not protect that information to the extent that it is used for the non-risk reduction program purpose. The use of that information within the railroad’s risk reduction program, however, remains protected. This section does not protect information that is required to be compiled or collected pursuant to any other provision of law or regulation.

(b) *Non-protected information.* This section does not affect the discovery, admissibility, or consideration for other purposes in a Federal or State court proceeding for damages involving personal injury, wrongful death, or property damage of information compiled or collected for a purpose other than that specifically identified in paragraph (a) of this section. Such information shall continue to be discoverable, admissible, or considered for other purposes in a Federal or State court proceeding for damages involving personal injury, wrongful death, or property damage if it was discoverable, admissible, or considered for other purposes in a Federal or State court proceeding for damages involving personal injury, wrongful death, or property damage on or before [INSERT DATE 365 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Specifically, the types of information not affected by this section include:

(1) Information compiled or collected on or before [INSERT DATE 365 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**];

(2) Information compiled or collected on or before [INSERT DATE 365 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**] and that continues to be compiled or collected, even if used to plan, implement, or evaluate a railroad's risk reduction program; or

(3) Information that is compiled or collected after [INSERT DATE 365 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], and is compiled or collected for a purpose other than that identified in paragraph (a) of this section.

(c) *Information protected by other law or regulation.* Nothing in this section shall affect or abridge in any way any other protection of information provided by another provision of law or regulation. Any such provision of law or regulation applies independently of the protections provided by this section.

(d) *Preemption.* To the extent that State discovery rules and sunshine laws would require disclosure of information protected by this section in a Federal or State court proceeding for damages involving personal injury, wrongful death, or property damage, those rules and laws are preempted.

(e) *Enforcement.* This section does not apply to civil or criminal law enforcement proceedings.

§ 271.13 Determination of inadequate safety performance.

(a) *General.* (1) This section describes FRA's methodology for determining which railroads shall establish an RRP because they have inadequate safety performance. FRA's methodology consists of a two-phase annual analysis, comprised of both a

quantitative analysis and qualitative assessment. FRA's methodology analyzes all railroads except for:

- (i) Railroads excluded from this part under § 271.3(b);
- (ii) Railroads already required to comply with this part;
- (iii) Railroads that are voluntarily complying with this part under § 271.15; and
- (iv) Except as provided in paragraph (a)(2) of this section, new start-up railroads that have reported accident/incident data to FRA pursuant to part 225 of this chapter for fewer than three years.

(2) Notwithstanding paragraph (a)(1)(iv) of this section, railroads formed through amalgamation of operations (for example, railroads formed through consolidations, mergers, or acquisitions of control) are included in the analysis using the combined data of the pre-amalgamation entities.

(b) *Quantitative analysis--(1) Methodology.* The first phase of FRA's annual analysis is a statistically-based quantitative analysis of each railroad within the scope of the analysis, using historical safety data maintained by FRA for the three most recent full calendar years. The purpose of the quantitative analysis is to make a threshold identification of railroads that possibly have inadequate safety performance. The quantitative analysis consists of a preliminary selection and a rate-based analysis. Only railroads that the preliminary selection identifies will proceed to the rate-based analysis.

- (i) The preliminary selection calculates the following values:

- (A) A railroad's number of worker on duty fatalities during the 3-year period, calculated using "Worker on Duty-Railroad Employee (Class A)," "Worker on Duty-Contractor (Class F)," and "Worker on Duty-Volunteer (Class H)" information reported

on FRA Form 6180.55 pursuant to FRA’s accident/incident reporting regulations in part 225 of this chapter; and

(B) The sum total of a railroad’s number of worker on duty injuries/illnesses during the 3-year period (calculated using “Worker on Duty-Railroad Employee (Class A),” “Worker on Duty-Contractor (Class F),” and “Worker on Duty-Volunteer (Class H)” information reported on FRA Form 6180.55 pursuant to FRA’s accident/incident reporting regulations in part 225 of this chapter) added to the number of rail equipment accidents/incidents during the 3-year period (calculated using information reported on FRA Forms 6180.54 and 6180.55 pursuant to FRA’s accident/incident reporting regulations in part 225 of this chapter).

(ii) For railroads that the preliminary selection identifies, as described in paragraph (b)(2)(i) of this section, the rate-based analysis calculates the following three factors:

(A) A railroad’s number of worker on duty fatalities during the 3-year period, calculated using “Worker on Duty-Railroad Employee (Class A),” “Worker on Duty-Contractor (Class F),” and “Worker on Duty-Volunteer (Class H)” information reported on FRA Form 6180.55 pursuant to FRA’s accident/incident reporting regulations in part 225 of this chapter;

(B) A railroad’s on duty employee injury/illness rate, calculated using “Worker on Duty-Railroad Employee (Class A),” “Worker on Duty-Contractor (Class F),” and “Worker on Duty-Volunteer (Class H)” information reported on FRA Form 6180.55 pursuant to FRA’s accident/incident reporting regulations in part 225 of this chapter. FRA calculates this rate using the following formula, which gives the rate of employee

injuries/illnesses per 200,000 employee hours over a 3-year period:

$$\text{Injury/Illness Rate} = (\text{Total FRA Reportable Worker On Duty Injuries} + \text{Total FRA Reportable On Duty Employee Illnesses over a 3-year Period}) / (\text{Total Employee Hours over a 3-year Period}/200,000); \text{ and}$$

(C) A railroad's rail equipment accident/incident rate, calculated using information reported on FRA Forms 6180.54 and 6180.55 pursuant to FRA's accident/incident reporting regulations in part 225 of this chapter. FRA calculates this rate using the following formula, which gives the rate of rail equipment accidents/incidents per 1,000,000 train miles operated over a 3-year period:

$$\text{Rail Equipment Accident/Incident Rate} = \text{Total FRA Reportable Rail Equipment Accidents/Incidents over a 3-year Period} / (\text{Total Train Miles over a 3-year Period}/1,000,000)$$

(2) *Identification.* (i) The preliminary selection phase of the quantitative analysis identifies railroads for further analysis in the rate-based analysis if at least one of the following two conditions exist within the scope and timeframe of the analysis:

(A) A railroad has one or more worker on duty fatalities as calculated in paragraph (b)(1)(i)(A) of this section; or

(B) A railroad is at or above the 90th percentile for the sum total of worker on duty injuries/illnesses and rail equipment accidents/incidents, as calculated in paragraph (b)(1)(i)(B) of this section.

(ii) For railroads identified in the preliminary selection, the rate-based analysis identifies railroads as possibly having inadequate safety performance if at least one of the

following two conditions exists within the scope and time frame of the analysis:

(A) A railroad has one or more worker on duty fatalities as calculated in paragraph (b)(1)(ii)(A) of this section; or

(B) A railroad is at or above the 90th percentile of railroads identified in the preliminary selection in either of the factors described in paragraphs (b)(1)(ii)(B) and (C) of this section.

(c) *Qualitative assessment.* The second phase of FRA's analysis is a qualitative assessment of railroads identified in the quantitative analysis as possibly having inadequate safety performance.

(1) *Notification and railroad/employee comment.* FRA will notify a railroad in writing if FRA conducts a qualitative assessment of the railroad because the quantitative analysis identified the railroad as possibly having inadequate safety performance.

(i) No later than 15 days after receiving FRA's written notice, a railroad shall notify its employees of FRA's written notice. The railroad shall post this employee notification at all locations where the railroad reasonably expects its employees to report and to have an opportunity to observe the notice. The railroad shall post and continuously display the employee notification until 45 days after FRA's initial written notice. The railroad shall notify employees who do not have a regular on-duty point for reporting to work by other means, under the railroad's standard practice for communicating with employees. The notification shall inform railroad employees that they may confidentially submit comments to FRA regarding the railroad's safety performance and that employees shall file any such comments with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer, 1200 New Jersey Avenue,

SE, Washington, DC 20590 no later than 45 days following FRA's initial written notice.

(ii) No later than 45 days after receiving FRA's written notice, a railroad may provide FRA documentation supporting any claims that the railroad does not have inadequate safety performance.

(2) *Methodology.* No later than 90 days after providing the initial notice to a railroad identified by the quantitative analysis, FRA will conduct a qualitative assessment of the identified railroad and make a final determination regarding whether it has inadequate safety performance. The qualitative assessment will consider any documentation provided by the railroad, comments submitted by railroad employees, and any other pertinent information, including information regarding violations FRA has issued against the railroad.

(d) *Final notification.* For each railroad that FRA provides an initial written notice, FRA will provide a final written notice informing the railroad whether or not FRA determines that the railroad has demonstrated inadequate safety performance.

(e) *Compliance.* (1) A railroad with inadequate safety performance shall develop and implement an RRP meeting the requirements of this part and submit an RRP plan meeting the filing and timing requirements in § 271.301.

(2) A railroad with inadequate safety performance must comply with the requirements of this part for a minimum of five years from the date FRA approves the railroad's RRP plan under subpart D of this part.

(f) *Petition for reconsideration of inadequate safety performance determination.*

(1) To appeal a final written notice under paragraph (d) of this section, a railroad shall

file a petition for reconsideration with the Administrator. To file a petition, the railroad must:

(i) File the petition no later than 30 days after the date the railroad receives FRA's final written notice under paragraph (d) of this section informing the railroad that it has demonstrated inadequate safety performance; and

(ii) File the petition in accordance with the procedures in §§ 211.7(b)(1) and 211.57 of this chapter.

(2) FRA will process petitions under § 211.59 of this chapter.

(g) *Petition to discontinue compliance with this part.* After the five-year compliance period, the railroad may petition FRA for approval to discontinue compliance with this part. A railroad shall file a petition, and FRA will process the petition, under the procedures contained in § 211.41 of this chapter. When processing a petition, FRA will reevaluate the railroad's safety performance to determine whether the railroad's RRP has resulted in significant and sustained safety improvements, and whether these measured improvements are likely sustainable in the long term. FRA's evaluation will include a quantitative analysis as described in paragraph (b) of this section, although FRA will not automatically grant a petition to discontinue compliance if the quantitative analysis results do not meet the identification thresholds described in paragraph (b)(2) of this section. For all petitions under this section, FRA will also examine qualitative factors and review information from FRA RRP audits and other relevant sources.

§ 271.15 Voluntary compliance.

(a) *General.* A railroad not otherwise subject to this part may voluntarily comply by establishing and fully implementing an RRP meeting the requirements of this part. A

voluntary RRP shall be supported by an RRP plan that has been submitted to FRA for approval pursuant to the requirements of subpart D of this part. After FRA has approved its RRP plan, a voluntarily-compliant railroad that fails to comply with the requirements of this part is subject to civil penalties or other FRA enforcement action.

(b) *Duration.* A voluntarily-compliant railroad will be required to comply with the requirements of this part for a minimum period of five years, running from the date on which FRA approves the railroad's plan pursuant to subpart D of this part.

(c) *Notification to discontinue compliance.* After this five-year period, a voluntarily-compliant railroad may discontinue compliance with this part by providing written notice to the FRA Associate Administrator for Railroad Safety and Chief Safety Officer, 1200 New Jersey Avenue, SE, Washington, DC 20590.

(d) *Discovery and admission as evidence of certain information.* The information protection provisions in § 271.11 apply to information compiled or collected pursuant to a voluntary RRP that is conducted in accordance with the requirements of this part and as provided by § 271.301(b)(4)(ii).

Subpart B—Risk Reduction Program Requirements

§ 271.101 Risk reduction programs.

(a) *Program required.* Each railroad shall establish and fully implement an RRP meeting the requirements of this part. An RRP shall systematically evaluate railroad safety hazards on a railroad's system and manage the resulting risks to reduce the number and rates of railroad accidents/incidents, injuries, and fatalities. An RRP is an ongoing program that supports continuous safety improvement. A railroad shall design its RRP so that it promotes and supports a positive safety culture at the railroad. An RRP shall

include the following:

- (1) A risk-based hazard management program, as described in § 271.103;
- (2) A safety performance evaluation component, as described in § 271.105;
- (3) A safety outreach component, as described in § 271.107;
- (4) A technology analysis and technology implementation plan, as described in § 271.109;
- (5) RRP implementation and support training, as described in § 271.111; and
- (6) Involvement of railroad employees in the establishment and implementation of an RRP, as described in § 271.113.

(b) *RRP plans.* A railroad's RRP shall be supported by an FRA-approved RRP plan meeting the requirements of subpart C of this part.

(c) *Host railroads and system safety programs.* (1) If a railroad subject to this part (RRP railroad) hosts passenger train service for a railroad subject to the system safety program requirements in part 270 of this title (system safety program (SSP) railroad), the RRP railroad shall communicate with the SSP railroad to coordinate the portions of the system safety program applicable to the RRP railroad hosting the passenger train service.

(2) The RRP railroad shall incorporate its communication and coordination with the SSP railroad into its own RRP.

(d) *Persons that perform or utilize significant safety-related services.* Under § 271.205(a)(3), a railroad's RRP plan shall identify persons that enter into a contractual relationship with the railroad to either perform significant safety-related services on the railroad's behalf or to utilize significant safety-related services provided by the railroad

for railroad operations purposes. For example, a railroad's RRP plan shall identify entities such as host railroads, contract operators, shared track/corridor operators, or other contractors utilizing or performing significant safety-related services. A railroad shall identify such persons even if the persons are not required to comply with this part (e.g., a railroad shall identify a tourist railroad that operates over the railroad's track even though the tourist railroad is exempt from this rule under § 271.3(b)(2)). A railroad shall ensure persons performing or utilizing significant safety-related services support and participate in its RRP.

§ 271.103 Risk-based hazard management program.

(a) *General.* (1) An RRP shall include an integrated, system-wide, and ongoing risk-based HMP that proactively identifies hazards and mitigates the risks resulting from those hazards.

(2) A risk-based HMP shall be fully implemented (i.e., activities initiated) within 36 months after FRA approves a railroad's RRP plan pursuant to § 271.301(d).

(b) *Risk-based hazard analysis.* As part of its risk-based HMP, a railroad shall conduct a risk-based hazard analysis that addresses, at a minimum, the following aspects of a railroad's system: infrastructure; equipment; employee levels and work schedules; operating rules and practices; management structure; employee training; and other areas impacting railroad safety that are not covered by railroad safety laws or regulations or other Federal laws or regulations. A railroad shall make the results of its risk-based hazard analysis available to FRA upon request. At a minimum, a risk-based hazard analysis shall:

(1) Identify hazards by analyzing:

(i) Aspects of the railroad's system, including any operational changes, system extensions, or system modifications; and

(ii) Accidents/incidents, injuries, fatalities, and other known indicators of hazards;

(2) Calculate risk by determining and analyzing the likelihood and severity of potential events associated with identified risk-based hazards; and

(3) Compare and prioritize the identified risks for mitigation purposes.

(c) *Mitigation strategies.* (1) As part of its risk-based HMP, a railroad shall design and implement mitigation strategies that improve safety by:

(i) Mitigating or eliminating aspects of a railroad's system that increase risks identified in the risk-based hazard analysis; and

(ii) Enhancing aspects of a railroad's system that decrease risks identified in the risk-based hazard analysis.

(2) A railroad may use pilot projects, including pilot projects conducted by other railroads, to determine whether quantitative data suggests that a particular mitigation strategy has potential to succeed on a full-scale basis.

§ 271.105 Safety performance evaluation.

(a) *General.* As part of its RRP, a railroad shall develop and maintain ongoing processes and systems for evaluating the safety performance of its system and identifying and analyzing its safety culture. A railroad's safety performance evaluation shall consist of both a safety monitoring and a safety assessment component.

(b) *Safety monitoring.* A railroad shall monitor the safety performance of its system by, at a minimum, establishing processes and systems to acquire safety data and

information from the following sources:

(1) Continuous monitoring of operational processes and systems (including any operational changes, system extensions, or system modifications);

(2) Periodic monitoring of the operational environment to detect changes that may generate new hazards;

(3) Investigations of accidents/incidents, injuries, fatalities, and other known indicators of hazards;

(4) Investigations of reports regarding potential non-compliance with Federal railroad safety laws or regulations, railroad operating rules and practices, or mitigation strategies established by the railroad; and

(5) A reporting system through which employees can report safety concerns (including, but not limited to, hazards, issues, occurrences, and incidents) and propose safety solutions and improvements.

(c) *Safety assessment.* To assess the need for changes to a railroad's mitigation strategies or overall RRP, a railroad shall establish processes to analyze the data and information collected pursuant to paragraph (b) of this section (as well as any other relevant data regarding its operations, products, and services). At a minimum, this assessment shall:

(1) Evaluate the overall effectiveness of the railroad's RRP in reducing the number and rates of railroad accidents/incidents, injuries, and fatalities;

(2) Evaluate the effectiveness of the railroad's RRP in meeting the goals described by its RRP plan (see § 271.203(c));

(3) Evaluate the effectiveness of risk mitigations in reducing the risk associated

with an identified hazard. Any hazards associated with ineffective mitigation strategies shall be reevaluated through the railroad's risk-based HMP, as described in § 271.103; and

(4) Identify new, potential, or previously unknown hazards, which shall then be evaluated by the railroad's risk-based HMP, as described in § 271.103.

§ 271.107 Safety outreach.

(a) *Outreach.* An RRP shall include a safety outreach component that communicates RRP safety information to railroad personnel (including contractors) as that information is relevant to their positions. At a minimum, a safety outreach program shall:

- (1) Convey safety-critical information;
- (2) Explain why RRP-related safety actions are taken; and
- (3) Explain why safety procedures are introduced or changed.

(b) *Reporting to management.* The status of risk-based HMP activities shall be reported to railroad senior management on an ongoing basis.

§ 271.109 Technology analysis and technology implementation plan.

(a) *General.* As part of its RRP, a Class I railroad shall conduct a technology analysis and develop and adopt a technology implementation plan no later than [INSERT DATE 1095 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**]. A railroad with inadequate safety performance shall conduct a technology analysis and develop and adopt a technology implementation plan no later than three years after receiving final written notification from FRA to comply with this part, pursuant to § 271.13(d), or no later than [INSERT DATE 1095 DAYS AFTER DATE

OF PUBLICATION IN THE **FEDERAL REGISTER**], whichever is later. A railroad that the STB reclassifies or newly classifies as a Class I railroad shall conduct a technology analysis and develop and adopt a technology implementation plan no later than three years following the effective date of the classification or reclassification or no later than [INSERT DATE 1155 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], whichever is later. A voluntarily-compliant railroad shall conduct a technology analysis and develop and adopt a technology implementation plan no later than three years after FRA approves the railroad's RRP plan.

(b) *Technology analysis.* A technology analysis shall evaluate current, new, or novel technologies that may mitigate or eliminate hazards and the resulting risks identified through the risk-based HMP. The railroad shall analyze the safety impact, feasibility, and costs and benefits of implementing technologies that will mitigate or eliminate hazards and the resulting risks. At a minimum, the technologies a railroad shall consider as part of its technology analysis are: processor-based technologies, positive train control systems, electronically-controlled pneumatic brakes, rail integrity inspection systems, rail integrity warning systems, switch position monitors and indicators, trespasser prevention technology, and highway-rail grade crossing warning and protection technology.

(c) *Technology implementation plan.* A railroad shall develop, and periodically update as necessary, a technology implementation plan that contains a prioritized implementation schedule describing the railroad's plan for development, adoption, implementation, maintenance, and use of current, new, or novel technologies on its system over a 10-year period to reduce safety risks identified in the railroad's risk-based

HMP.

(d) *Positive train control.* Except as required by subpart I of part 236 of this chapter, if a railroad decides to implement positive train control systems as part of its technology analysis and implementation plan, the railroad shall set forth and comply with a schedule for implementation of the positive train control system consistent with the deadlines in the Positive Train Control Enforcement and Implementation Act of 2015, Pub. L. 114-73, 129 Stat. 576-82 (Oct. 29, 2015), and 49 CFR 236.1005(b)(7).

§ 271.111 Implementation and support training.

(a) A railroad shall provide RRP training to each employee, including an employee of any person identified by the railroad's RRP plan pursuant to § 271.205(a)(3) as performing significant safety-related services on the railroad's behalf or utilizing significant safety-related services provided by the railroad, who has significant responsibility for implementing and supporting the railroad's RRP. This training shall help ensure that all personnel with significant responsibility for implementing and supporting the RRP understand the goals of the program, are familiar with the elements of the railroad's program, and have the requisite knowledge and skills to fulfill their responsibilities under the program.

(b) A railroad shall keep a record of training conducted under this section and update that record as necessary. A railroad shall make training records available for inspection and copying upon the request of representatives of FRA or States participating under part 212 of this chapter.

(c) Training under this section may include, but is not limited to, interactive computer-based training, video conferencing, or formal classroom training.

§ 271.113 Involvement of railroad employees.

(a) An RRP shall involve a railroad's directly affected employees in the establishment and implementation of the RRP.

(b) For example, a railroad must have a process for involving directly affected employees when identifying hazards, developing and implementing mitigation strategies, conducting internal annual assessments, or otherwise performing actions required by this part.

Subpart C—Risk Reduction Program Plan Requirements

§ 271.201 General.

A railroad shall adopt and implement its RRP through a written RRP plan containing the elements described in this subpart. A railroad's RRP plan shall be approved by FRA according to the requirements contained in subpart D of this part.

§ 271.203 Policy, purpose and scope, and goals.

(a) *Policy statement.* An RRP plan shall contain a policy statement endorsing the railroad's RRP. This statement shall be signed by the chief official at the railroad (e.g., chief executive officer).

(b) *Purpose and scope.* An RRP plan shall contain a statement describing the purpose and scope of the railroad's RRP. This purpose and scope statement shall describe:

- (1) The railroad's safety philosophy and safety culture;
- (2) How the railroad promotes improvements to its safety culture; and
- (3) The roles and responsibilities of railroad personnel (including management) within the railroad's RRP.

(c) *Goals.* An RRP plan shall contain a statement that defines the specific goals of the RRP and describes clear strategies for reaching those goals. These goals shall be long-term, meaningful, measurable, and focused on the mitigation of risks arising from identified safety hazards.

§ 271.205 System description.

(a) An RRP plan shall contain a description of the characteristics of the railroad's system. At a minimum, the system description shall:

(1) Support the identification of hazards by establishing a basic understanding of the scope of the railroad's system;

(2) Include components briefly describing the railroad's history, operations, scope of service, maintenance, physical plant, and system requirements;

(3) Identify all persons that enter into a contractual relationship with the railroad to either perform significant safety-related services on the railroad's behalf or to utilize significant safety-related services provided by the railroad for railroad operations purposes. For example, a railroad's RRP plan shall identify entities such as host railroads, contract operators, shared track/corridor operators, or other contractors utilizing or performing significant safety-related services. A railroad shall identify such persons even if the persons are not required to comply with this part (e.g., a railroad shall identify a tourist railroad that operates over the railroad's track even though the tourist railroad is exempt from this part pursuant to § 271.3(b)(2)); and

(4) Describe how the railroad will ensure that any persons identified pursuant to paragraph (a)(3) of this section will support and participate in the railroad's RRP. For example, the system description shall describe the extent to which such persons will, as

part of the railroad's RRP, assist in identifying hazards, developing and implementing mitigation strategies, conducting internal annual assessments, or otherwise performing actions required by this part.

(b) [Reserved]

§ 271.207 Consultation requirements.

(a) *General duty.* (1) Each railroad required to establish an RRP under this part shall in good faith consult with, and use its best efforts to reach agreement with, all of its directly affected employees, including any non-profit labor organization representing a class or craft of directly affected employees, on the contents of the RRP plan.

(2) A railroad that consults with a non-profit employee labor organization is considered to have consulted with the directly affected employees represented by that organization.

(b) *Preliminary meeting.* A railroad shall have a preliminary meeting with its directly affected employees to discuss how the consultation process will proceed. A railroad is not required to discuss the substance of an RRP plan during this preliminary meeting.

(1) A Class I railroad shall meet no later than [INSERT DATE 240 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER] with its directly affected employees to discuss the consultation process. The Class I railroad shall notify the directly affected employees of this meeting no less than 60 days before it is scheduled.

(2) A railroad determined to have inadequate safety performance shall meet no later than 30 days following FRA's notification with its directly affected employees to

discuss the consultation process. The inadequate safety performance railroad shall notify the directly affected employees of this meeting no less than 15 days before it is scheduled.

(3) A railroad that the STB reclassifies or newly classifies as a Class I railroad shall meet with its directly affected employees to discuss the consultation process no later than 30 days following the effective date of the classification or reclassification. The reclassified or newly classified Class I railroad shall notify the directly affected employees of this meeting no less than 15 days before it is scheduled.

(4) A voluntarily-compliant railroad that files a notification with FRA of its intent to file an RRP plan under § 271.301(b)(4)(i) shall meet with its directly affected employees to discuss the consultation process no later than 30 days following the date that the railroad filed the notification. The voluntarily-compliant railroad shall notify the directly affected employees of this meeting no less than 15 days before it is scheduled.

(5) Compliance with the mandatory preliminary meeting requirements of this paragraph (b) does not constitute full compliance with the consultation requirements of this section.

(c) *Guidance.* Appendix A to this part contains guidance on how a railroad could comply with the requirements of this section.

(d) *Railroad consultation statements.* A railroad required to submit an RRP plan under § 271.301 shall also submit, together with that plan, a consultation statement that includes the following information:

(1) A detailed description of the process the railroad utilized to consult with its directly affected employees;

(2) If the railroad could not reach agreement with its directly affected employees on the contents of its RRP plan, identification of any known areas of non-agreement and an explanation why it believes agreement was not reached; and

(3) A service list containing the names and contact information for each international/national president of any non-profit employee labor organization representing a class or craft of the railroad's directly affected employees. The service list must also contain the name and contact information for any directly affected employee who significantly participated in the consultation process independently of a non-profit employee labor organization. If an international/national president did not participate in the consultation process, the service list shall also contain the name and contact information for a designated representative who participated on his or her behalf. When a railroad submits its RRP plan and consultation statement to FRA under § 271.301, it shall also simultaneously send a copy of these documents to all individuals identified in the service list. A railroad may send the documents to the identified individuals via electronic means or other service means reasonably calculated to succeed.

(e) *Statements from directly affected employees.* (1) If a railroad and its directly affected employees cannot reach agreement on the proposed contents of an RRP plan, the directly affected employees may file a statement explaining their views on the plan on which agreement was not reached with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer, 1200 New Jersey Avenue, SE, Washington, DC 20590. The FRA Associate Administrator shall consider any such views during the plan review and approval process.

(2) A railroad's directly affected employees have 30 days following the railroad's

submission of a proposed RRP plan to submit the statement described in paragraph (e)(1) of this section.

§ 271.209 Consultation on amendments.

A railroad's RRP plan shall include a description of the process the railroad will use to consult with its directly affected employees on any subsequent substantive amendments to the railroad's RRP plan. The requirements of this section do not apply to non-substantive amendments (e.g., amendments that update names and addresses of railroad personnel).

§ 271.211 Risk-based hazard management program process.

(a) *Risk-based hazard analysis.* An RRP plan shall describe the railroad's method for conducting its risk-based hazard analysis pursuant to § 271.103(b). At a minimum, the description shall specify:

(1) The processes the railroad will use to identify hazards and the risks associated with those hazards;

(2) The sources the railroad will use to support the ongoing identification of hazards and the risks associated with those hazards; and

(3) The processes the railroad will use to compare and prioritize identified risks for mitigation purposes.

(b) *Mitigation strategies.* An RRP plan shall describe the railroad's processes for designing and implementing mitigation strategies pursuant to § 271.103(c). At a minimum, the description shall specify the railroad's processes for:

(1) Identifying and selecting mitigation strategies; and

(2) Monitoring an identified hazard through the mitigation of the risk associated

with that hazard.

§ 271.213 Safety performance evaluation process.

An RRP plan shall describe a railroad's processes for identifying and analyzing its safety culture pursuant to § 271.105(a), monitoring safety performance pursuant to § 271.105(b), and conducting safety assessments pursuant to § 271.105(c).

§ 271.215 Safety outreach process.

An RRP plan shall describe a railroad's processes for communicating safety information to railroad personnel and management pursuant to § 271.107.

§ 271.217 Technology implementation plan process.

(a) An RRP plan shall contain a description of the railroad's processes for:

- (1) Conducting a technology analysis pursuant to § 271.109(b); and
- (2) Developing a technology implementation plan pursuant to § 271.109(c).

(b) [Reserved]

§ 271.219 Implementation and support training plan.

(a) An RRP plan shall contain a training plan describing the railroad's processes, pursuant to § 271.111, for training employees with significant responsibility for implementing and supporting the RRP (including employees of a person identified pursuant to § 271.205(a)(3) as performing significant safety-related services on the railroad's behalf or utilizing significant safety-related services provided by the railroad for railroad operations purposes who have significant responsibility for implementing and supporting the railroad's RRP).

(b) The training plan shall describe the content of the RRP training for each position or job function identified pursuant to § 271.225(b)(3) as having significant

responsibilities for implementing the RRP.

§ 271.221 Involvement of railroad employees process.

An RRP plan shall contain a description of the railroad's processes for involving railroad employees in the establishment and implementation of an RRP pursuant to § 271.113. If a railroad contracts out significant portions of its operations, the contractor and the contractor's employees performing the railroad's operations shall be considered employees for the purposes of this section.

§ 271.223 Internal assessment process.

(a) An RRP plan shall describe the railroad's processes for conducting an internal assessment of its RRP pursuant to subpart E of this part. At a minimum, this description shall contain the railroad's processes used to:

- (1) Conduct an internal assessment of its RRP;
- (2) Internally report the results of its internal assessment to railroad senior management; and
- (3) Develop improvement plans, including developing and monitoring recommended improvements (including any necessary revisions or updates to the RRP plan) for fully implementing the railroad's RRP, complying with the implemented elements of the RRP plan, or achieving the goals identified in the railroad's RRP plan pursuant to § 271.203(c).

(b) [Reserved]

§ 271.225 RRP implementation plan.

(a) An RRP plan shall describe how the railroad will implement its RRP. A railroad may implement its RRP in stages, so long as the railroad fully implements the

entire RRP within 36 months of FRA's approval of the plan.

(b) At a minimum, a railroad's implementation plan shall:

(1) Cover the entire implementation period;

(2) Contain a timeline describing when certain implementation milestones will be achieved. Implementation milestones shall be specific and measurable;

(3) Describe the roles and responsibilities of each position or job function that has significant responsibility for implementing the railroad's RRP or any changes to the railroad's RRP (including any such positions or job functions held by a person that enters into a contractual relationship with the railroad to either perform significant safety-related services on the railroad's behalf or to utilize significant safety-related services provided by the railroad for railroad operations purposes); and

(4) Describe how significant changes to the RRP may be made.

Subpart D—Review, Approval, and Retention of Risk Reduction Program Plans

§ 271.301 Filing and approval.

(a) *Filing.* A railroad shall submit one copy of its RRP plan to the FRA Associate Administrator for Railroad Safety and Chief Safety Officer, 1200 New Jersey Avenue, SE, Washington, DC 20590.

(b) *Filing timeline.* (1) A Class I railroad shall submit its RRP plan no later than [INSERT DATE 545 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

(2) A railroad with inadequate safety performance shall submit its RRP plan no later than 180 days after receiving final written notification from FRA that it shall comply with this part, pursuant to § 271.13(d), or no later than [INSERT DATE 545 DAYS

AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], whichever is later.

(3) A railroad that the STB reclassifies or newly classifies as a Class I railroad shall submit its RRP plan no later than 90 days following the effective date of the classification or reclassification or no later than [INSERT DATE 545 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], whichever is later.

(4)(i) Before submitting an RRP plan for FRA's review and approval, a voluntarily-compliant railroad shall notify FRA of its intent to submit an RRP plan by providing written notice to the FRA Associate Administrator for Railroad Safety and Chief Safety Officer, 1200 New Jersey Avenue, SE, Washington, DC 20590.

(ii) The date that FRA receives a voluntarily-compliant railroad's written notice or [INSERT DATE 366 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], whichever is later, serves as the date on which the voluntarily-compliant railroad may start compiling or collecting information solely for the purpose of planning, implementing, or evaluating a risk reduction program, as described by § 271.11.

(iii) A voluntarily-compliant railroad shall submit its RRP plan no later than 180 days after FRA receives written notice that the voluntarily-compliant railroad intends to submit an RRP plan for review and approval.

(c) *RRP plan requirements.* An RRP plan submitted by a railroad shall include:

(1) The signature, name, title, address, and telephone number of the chief official responsible for safety and who bears the primary managerial authority for implementing the submitting railroad's safety policy. By signing, this chief official is certifying that the contents of the RRP plan are accurate and that the railroad will implement the contents of

the program as approved by FRA;

(2) The contact information for the primary person responsible for managing the RRP;

(3) The contact information for the senior representatives of any person that the railroad has determined has entered into a contractual relationship with the railroad to either perform significant safety-related services on the railroad's behalf or to utilize significant safety-related services provided by the railroad for railroad operations purposes (including host railroads, contract operators, shared track/corridor operators, and other contractors); and

(4) As required by § 271.207(d), a statement describing how it consulted with its directly affected employees on the contents of its RRP plan. Directly affected employees have 30 days following the railroad's submission of its proposed RRP plan to file a statement under § 271.207(e)(2).

(d) *Approval.* (1) Within 90 days of receipt of an RRP plan, or within 90 days of receipt of each RRP plan submitted before the start of railroad operations, FRA will review the proposed RRP plan to determine if it sufficiently addresses the required elements. This review will also consider any statement submitted by directly affected employees pursuant to § 271.207(e).

(2) FRA will notify the primary contact person of the submitting railroad in writing whether FRA has approved the proposed plan and, if not approved, the specific points in which the RRP plan is deficient. FRA will also provide this notification to each individual identified in the service list accompanying the consultation statement required under § 271.207(d).

(3) If FRA does not approve an RRP plan, the submitting railroad shall amend the proposed plan to correct all identified deficiencies and shall provide FRA a corrected copy no later than 90 days following receipt of FRA's written notice that the submitted plan was not approved. If FRA determines that the necessary corrections are substantively significant, it will direct the railroad to consult further with its directly affected employees regarding the corrections. If the corrections are substantively significant, a railroad will also be required to include an updated consultation statement, along with its resubmitted plan, pursuant to § 271.207(d). Directly affected employees will also have 30 days following the railroad's resubmission of its proposed RRP plan to file a statement addressing the substantively significant changes under § 271.207(e). Within 60 days of receipt of a corrected RRP plan, FRA will review the corrected RRP plan to determine if it sufficiently addresses the identified deficiencies.

(4) Approval of a railroad's RRP plan under this part does not constitute approval of the specific actions the railroad will implement under its RRP plan and shall not be construed as establishing a Federal standard regarding those specific actions.

(e) *Electronic submission.* All documents required to be submitted to FRA under this part may be submitted electronically pursuant to the procedures in appendix B to this part.

§ 271.303 Amendments.

(a) *Consultation requirements.* (1) For substantive amendments, a railroad shall follow the process, described in its RRP plan pursuant to § 271.209, for consulting with its directly affected employees and submitting a consultation statement to FRA. The requirements of this paragraph (a)(1) do not apply to non-substantive amendments (e.g.,

amendments that update names and addresses of railroad personnel).

(2) If a railroad and its directly affected employees cannot reach agreement on the proposed contents of a substantive amendment, the directly affected employees may file a statement with FRA under the procedures in § 271.207(e)(1). A railroad's directly affected employees have 15 days following the railroad's submission of a proposed amendment to submit the statement described in this paragraph.

(b) *Filing.* (1) A railroad shall submit any amendment(s) to its approved RRP plan to FRA's Associate Administrator not less than 60 days before the proposed effective date of the amendment(s). The railroad shall file the amendment(s) with a cover letter outlining the proposed change(s) to the approved RRP plan.

(2) If the proposed amendment is limited to adding or changing a name, title, address, or telephone number of a person, FRA approval is not required under the process of this section, although the railroad shall still file the amended RRP plan with FRA's Associate Administrator for Railroad Safety and Chief Safety Officer. These proposed amendments may be implemented by the railroad upon filing with FRA. All other proposed amendments must comply with the formal approval process described by this section.

(c) *Review.* (1) FRA will review a proposed amendment to an RRP plan within 45 days of receipt. FRA will then notify the primary contact person of the railroad regarding whether FRA has approved the proposed amendment. FRA will also provide this notification to each individual identified in the service list accompanying the consultation statement required under paragraph (a)(1) of this section. If not approved, FRA will inform the railroad and the individuals identified in the service list of the

specific points in which the proposed amendment is deficient.

(2) If FRA has not notified the railroad and the individuals identified in the service list by the proposed effective date of the amendment whether the amendment has been approved or not, the railroad may implement the amendment, subject to FRA's decision.

(3) If a proposed RRP plan amendment is not approved by FRA, no later than 60 days following the receipt of FRA's written notice, the railroad shall either provide FRA a corrected copy of the amendment that addresses all deficiencies noted by FRA or notice that the railroad is retracting the amendment.

§ 271.305 Reopened review.

Following approval of an RRP plan or an amendment to such a plan, FRA may reopen review of the plan or amendment, in whole or in part, for cause stated.

§ 271.307 Retention of RRP plans.

(a) *Railroads.* A railroad shall retain at its system and division headquarters one copy of its RRP plan and each subsequent amendment to that plan. A railroad may comply with this requirement by making an electronic copy available.

(b) *Inspection and copying.* A railroad shall make a copy of the RRP plan and each subsequent amendment available to representatives of FRA or States participating under part 212 of this chapter for inspection and copying during normal business hours.

Subpart E—Internal Assessments

§ 271.401 Annual internal assessments.

(a) Beginning with the first calendar year after the calendar year in which FRA approves a railroad's RRP plan pursuant to § 271.301(d), the railroad shall annually (i.e.,

once every calendar year) conduct an internal assessment of its RRP.

(b) The internal assessment shall determine the extent to which the railroad has:

(1) Achieved the implementation milestones described in its RRP plan pursuant to § 271.225(b);

(2) Complied with the implemented elements of the approved RRP plan;

(3) Achieved the goals described in its RRP plan pursuant to § 271.203(c);

(4) Implemented previous internal assessment improvement plans pursuant to § 271.403; and

(5) Implemented previous external audit improvement plans pursuant to § 271.503.

(c) A railroad shall ensure that the results of its internal assessments are internally reported to railroad senior management.

§ 271.403 Internal assessment improvement plans.

(a) Within 30 days of completing its internal assessment, a railroad shall develop an improvement plan that addresses the findings of its internal assessment.

(b) At a minimum, a railroad's improvement plan shall:

(1) Describe recommended improvements (including any proposed revisions or updates to the RRP plan the railroad expects to make through the amendment process described in § 271.303) that address the findings of the internal assessment for fully implementing the railroad's RRP, complying with the implemented elements of the RRP plan, achieving the goals identified in the railroad's RRP plan pursuant to § 271.203(c), and implementing previous internal assessment improvement plans and external audit improvement plans;

(2) Identify by position title the individual who is responsible for carrying out the recommended improvements;

(3) Contain a timeline describing when specific and measurable milestones for implementing the recommended improvements will be achieved; and

(4) Specify processes for monitoring the implementation and evaluating the effectiveness of the recommended improvements.

§ 271.405 Internal assessment reports.

(a) Within 60 days of completing its internal assessment, a railroad shall submit a copy of an internal assessment report to the FRA Associate Administrator for Railroad Safety and Chief Safety Officer, 1200 New Jersey Avenue, SE, Washington, DC 20590.

(b) This report shall be signed by the railroad's chief official responsible for safety and who bears primary managerial authority for implementing the railroad's safety policy. The report shall include:

(1) A description of the railroad's internal assessment;

(2) The findings of the internal assessment;

(3) A specific description of the recommended improvements contained in the railroad's internal assessment improvement plan, including any proposed amendments the railroad intends to make to the railroad's RRP plan pursuant to § 271.303; and

(4) The status of the recommended improvements contained in the railroad's internal assessment improvement plan and any outstanding recommended improvements from previous internal assessment improvement plans.

Subpart F—External Audits

§ 271.501 External audits.

FRA will conduct (or cause to be conducted) external audits of a railroad's RRP. Each audit shall evaluate the railroad's compliance with the elements of its RRP required by this part. A railroad shall make documentation kept pursuant to its RRP plan available for inspection and copying by representatives of FRA or States participating under part 212 of this chapter upon request. FRA will provide a railroad written notice of the audit results.

§ 271.503 External audit improvement plans.

(a) *Submission.* Within 60 days of receiving FRA's written notice of the audit results, if necessary, a railroad shall submit for approval an improvement plan addressing any instances of deficiency or non-compliance found in the audit to the FRA Associate Administrator for Railroad Safety and Chief Safety Officer, 1200 New Jersey Avenue, SE, Washington, DC 20590.

(b) *Requirements.* At a minimum, an improvement plan shall:

(1) Describe the improvements the railroad will implement to address the audit findings;

(2) Identify by position title the individual(s) responsible for carrying out the improvements necessary to address the audit findings; and

(3) Contain a timeline describing when milestones for implementing the recommended improvements will be achieved. These implementation milestones shall be specific and measurable.

(c) *Approval.* If FRA does not approve the railroad's improvement plan, FRA will notify the railroad of the plan's specific deficiencies. The railroad shall amend the proposed plan to correct the identified deficiencies and provide FRA a corrected copy no

later than 30 days following receipt of FRA’s notice that the proposed plan was not approved.

(d) *Status reports.* Upon the request of the FRA Associate Administrator, a railroad shall provide FRA for review a status report on the implementation of the improvements contained in the improvement plan.

Appendix A to Part 271—Federal Railroad Administration Guidance on the Risk Reduction Program Consultation Process

A railroad required to develop a risk reduction program (RRP) under this part shall in good faith consult with and use its best efforts to reach agreement with its directly affected employees on the contents of the RRP plan. *See* § 271.207(a)(1). This appendix discusses the meaning of the terms “good faith” and “best efforts,” and provides non-mandatory guidance on how a railroad may comply with the requirement to consult with directly affected employees on the contents of its RRP plan. Guidance is provided for employees who are represented by a non-profit employee labor organization and employees who are not represented by any such organization.

I. The Meaning of “Good Faith” and “Best Efforts”

“Good faith” and “best efforts” are not interchangeable terms representing a vague standard for the § 271.207 consultation process. Rather, each term has a specific and distinct meaning. When consulting with directly affected employees, therefore, a railroad shall independently meet the standards for both the good faith and best efforts obligations. A railroad that does not meet the standard for one or the other will not be in compliance with the consultation requirements of § 271.207.

The good faith obligation requires a railroad to consult with employees in a

manner that is honest, fair, and reasonable, and to genuinely pursue agreement on the contents of an RRP plan. If a railroad consults with its employees merely in a perfunctory manner, without genuinely pursuing agreement, it will not have met the good faith requirement. For example, a lack of good faith may be found if a railroad's directly affected employees express concerns with certain parts of the railroad's RRP plan, and the railroad neither addresses those concerns in further consultation nor attempts to address those concerns by making changes to the RRP plan.

On the other hand, "best efforts" establishes a higher standard than that imposed by the good faith obligation, and describes the diligent attempts that a railroad shall pursue to reach agreement with its employees on the contents of its RRP plan. While the good faith obligation is concerned with the railroad's state of mind during the consultation process, the best efforts obligation is concerned with the specific efforts made by the railroad in an attempt to reach agreement. This would include considerations such as whether a railroad had held sufficient meetings with its employees to address or make an attempt to address any concerns raised by the employees, or whether the railroad had made an effort to respond to feedback provided by employees during the consultation process. For example, a railroad would not meet the best efforts obligation if it did not initiate the consultation process in a timely manner, and thereby failed to provide employees sufficient time to engage in the consultation process. A railroad would also likely not meet the best efforts obligation if it presented employees with an RRP plan and only permitted the employees to express agreement or disagreement on the plan (assuming that the employees had not previously indicated that such a consultation would be acceptable). A railroad may, however, wish to hold off

substantive consultations regarding the contents of its RRP plan until one year after publication of the rule to ensure that information generated as part of the process is protected from discovery and admissibility into evidence under § 271.11. Generally, best efforts are measured by the measures that a reasonable person in the same circumstances and of the same nature as the acting party would take. Therefore, the standard imposed by the best efforts obligation may vary with different railroads, depending on a railroad's size, resources, and number of employees.

When reviewing RRP plans, FRA will determine on a case-by-case basis whether a railroad has met its § 271.207 good faith and best efforts obligations. This determination will be based upon the consultation statement submitted by the railroad pursuant to § 271.207(b) and any statements submitted by employees pursuant to § 271.207(c). If FRA finds that these statements do not provide sufficient information to determine whether a railroad used good faith and best efforts to reach agreement, FRA may investigate further and contact the railroad or its employees to request additional information. (FRA also expects a railroad's directly affected employees to utilize good faith and best efforts when negotiating on the contents of an RRP plan. If FRA's review and investigation of the statements submitted by the railroad under § 271.207(b) and the directly affected employees under § 271.207(c) reveal that the directly affected employees did not utilize good faith and best efforts, FRA could consider this as part of its approval process.)

If FRA determines that a railroad did not use good faith and best efforts, FRA may disapprove the RRP plan submitted by the railroad and direct the railroad to comply with the consultation requirements of § 271.207. Pursuant to § 271.301(b)(3), if FRA

does not approve the RRP plan, the railroad will have 90 days, following receipt of FRA's written notice that the plan was not approved, to correct any deficiency identified. In such cases, the identified deficiency would be that the railroad did not use good faith and best efforts to consult and reach agreement with its directly affected employees. If a railroad then does not submit to FRA within 90 days an RRP plan meeting the consultation requirements of § 271.207, the railroad could be subject to penalties for failure to comply with § 271.301(b)(3).

II. Guidance on How a Railroad May Consult With Directly Affected Employees

Because the standard imposed by the best efforts obligation will vary depending upon the railroad, there may be countless ways for various railroads to comply with the consultation requirements of § 271.207. Therefore, it is important to maintain a flexible approach to the § 271.207 consultation requirements, to give a railroad and its directly affected employees the freedom to consult in a manner best suited to their specific circumstances.

FRA is nevertheless providing guidance in this appendix as to how a railroad may proceed when consulting (utilizing good faith and best efforts) with employees in an attempt to reach agreement on the contents of an RRP plan. This guidance may be useful as a starting point for railroads that are uncertain about how to comply with the § 271.207 consultation requirements. This guidance distinguishes between employees who are represented by a non-profit employee labor organization and employees who are not, as the processes a railroad may use to consult with represented and non-represented employees could differ significantly.

This guidance does not establish prescriptive requirements with which a railroad

shall comply, but merely outlines a consultation process a railroad may choose to follow. A railroad's consultation statement could indicate that the railroad followed the guidance in this appendix as evidence that it utilized good faith and best efforts to reach agreement with its employees on the contents of an RRP plan.

(a) Employees Represented by a Non-Profit Employee Labor Organization

As provided in § 271.207(b)(1), a railroad consulting with the representatives of a non-profit employee labor organization on the contents of an RRP plan will be considered to have consulted with the directly affected employees represented by that organization.

A railroad may utilize the following process as a roadmap for using good faith and best efforts when consulting with represented employees in an attempt to reach agreement on the contents of an RRP plan.

(1) Pursuant to § 271.207(b)(1), a railroad must meet with representatives from a non-profit employee labor organization (representing a class or craft of the railroad's directly affected employees) within 240 days from [INSERT DATE OF PUBLICATION IN THE **FEDERAL REGISTER**] to begin the process of consulting on the contents of the railroad's RRP plan. A railroad must provide notice at least 60 days before the scheduled meeting.

(2) During the time between the initial meeting and the applicability date of § 271.11, the parties may meet to discuss administrative details of the consultation process as necessary.

(3) Within 60 days after [INSERT DATE 365 DAYS AFTER THE DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], a railroad should have a meeting

with the representatives of the directly affected employees to discuss substantive issues with the RRP plan.

(4) Within 180 days after [INSERT DATE 365 DAYS AFTER THE DATE OF PUBLICATION IN THE **FEDERAL REGISTER**] or as otherwise provided by § 271.301(b), a railroad would file its RRP plan with FRA.

(5) As provided by § 271.207(e), if agreement on the contents of an RRP plan could not be reached, a labor organization (representing a class or craft of the railroad's directly affected employees) may file a statement with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer explaining its views on the plan on which agreement was not reached.

(b) Employees Who Are Not Represented by a Non-Profit Employee Labor Organization

FRA recognizes that some (or all) of a railroad's directly affected employees may not be represented by a non-profit employee labor organization. For such non-represented employees, the consultation process described for represented employees may not be appropriate or sufficient. For example, a railroad with non-represented employees should make a concerted effort to ensure that its non-represented employees are aware that they are able to participate in the development of the railroad's RRP plan. FRA therefore is providing the following guidance regarding how a railroad may utilize good faith and best efforts when consulting with non-represented employees on the contents of its RRP plan.

(1) Within 120 days from [INSERT DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], a railroad may notify non-represented employees that—

(A) The railroad is required to consult in good faith with, and use its best efforts to reach agreement with, all directly affected employees on the proposed contents of its RRP plan;

(B) Non-represented employees are invited to participate in the consultation process (and include instructions on how to engage in this process); and

(C) If a railroad is unable to reach agreement with its directly affected employees on the contents of the proposed RRP plan, an employee may file a statement with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer explaining his or her views on the plan on which agreement was not reached.

(2) This initial notification (and all subsequent communications, as necessary or appropriate) could be provided to non-represented employees in the following ways:

(A) Electronically, such as by email or an announcement on the railroad's Web site;

(B) By posting the notification in a location easily accessible and visible to non-represented employees; or

(C) By providing all non-represented employees a hard copy of the notification.

A railroad could use any or all of these methods of communication, so long as the notification complies with the railroad's obligation to utilize best efforts in the consultation process.

(3) Following the initial notification (and before submitting its RRP plan to FRA), a railroad should provide non-represented employees a draft proposal of its RRP plan. This draft proposal should solicit additional input from non-represented employees, and the railroad should provide non-represented employees 60 days to submit comments

to the railroad on the draft.

(4) Following this 60-day comment period and any changes to the draft RRP plan made as a result, the railroad should submit the proposed RRP plan to FRA, as required by this part.

(5) As provided by § 271.207(e), if agreement on the contents of an RRP plan cannot be reached, then a non-represented employee may file a statement with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer explaining his or her views on the plan on which agreement was not reached.

Appendix B to Part 271—Procedures for Submission of RRP Plans and Statements From Directly Affected Employees

This appendix establishes procedures for the submission of a railroad's RRP plan and statements by directly affected employees consistent with the requirements of this part.

Submission by a Railroad and Directly Affected Employees

(a) As provided for in § 271.101, each railroad must establish and fully implement an RRP that continually and systematically evaluates railroad safety hazards on its system and manages the resulting risks to reduce the number and rates of railroad accidents, incidents, injuries, and fatalities. The RRP shall be fully implemented and supported by a written RRP plan. Each railroad must submit its RRP plan to FRA for approval as provided for in § 271.201.

(b) As provided for in § 271.207(e), if a railroad and its directly affected employees cannot come to agreement on the proposed contents of the railroad's RRP plan, the directly affected employees have 30 days following the railroad's submission of

its proposed RRP plan to submit a statement to the FRA Associate Administrator for Railroad Safety and Chief Safety Officer explaining the directly affected employees' views on the plan on which agreement was not reached.

(c) The railroad's and directly affected employees' submissions shall be sent to the Associate Administrator for Railroad Safety and Chief Safety Officer, FRA. The mailing address for FRA is 1200 New Jersey Avenue, SE, Washington, DC 20590. When a railroad submits its RRP plan and consultation statement to FRA pursuant to § 271.301, it must also simultaneously send a copy of these documents to all individuals identified in the service list pursuant to § 271.207(d)(3).

(d) Each railroad and directly affected employee is authorized to file by electronic means any submissions required under this part. Before any person files a submission electronically, the person shall provide the FRA Associate Administrator for Railroad Safety and Chief Safety Officer with the following information in writing:

- (1) The name of the railroad or directly affected employee(s);
- (2) The names of two individuals, including job titles, who will be the railroad's or directly affected employees' points of contact and will be the only individuals allowed access to FRA's secure document submission site;
- (3) The mailing addresses for the railroad's or directly affected employees' points of contact;
- (4) The railroad's system or main headquarters address located in the United States;
- (5) The email addresses for the railroad's or directly affected employees' points of contact; and

(6) The daytime telephone numbers for the railroad's or directly affected employees' points of contact.

(e) A request for electronic submission or FRA review of written materials shall be addressed to the FRA Associate Administrator for Railroad Safety and Chief Safety Officer, Federal Railroad Administration, 1200 New Jersey Avenue, SE, Washington, DC 20590. Upon receipt of a request for electronic submission that contains the information listed above, FRA will then contact the requestor with instructions for electronically submitting its program or statement. A railroad that electronically submits an initial RRP plan or new portions or revisions to an approved program required by this part shall be considered to have provided its consent to receive approval or disapproval notices from FRA by email. FRA may electronically store any materials required by this part regardless of whether the railroad that submits the materials does so by delivering the written materials to the Associate Administrator and opts not to submit the materials electronically. A railroad that opts not to submit the materials required by this part electronically, but provides one or more email addresses in its submission, shall be considered to have provided its consent to receive approval or disapproval notices from FRA by email or mail.

Issued in Washington, DC.

Ronald L. Batory,

Administrator,

Federal Railroad Administration.

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